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A MANUAL

OF

CRIMINAL LAW

AS ESTABLISHED IN THE

STATE OF MARYLAND.

BY

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PREFACE.

THE primary design of the following pages is, to present, in a succinct and systematic mode, the common-law principles and statutory provisions constituting the criminal law as established in Maryland. It has, however, been deemed expedient, in various portions of the work, to supplement the statements of law drawn from the sources referred to by references to and citations of well-settled principles and established doctrines found in the works of standard text-writers, well-considered decisions in other courts than our own and instructive discussions in leading law periodicals. To have given the whole body of the statute law would have swelled the work to such undesirable proportions, that it was deemed well to give the full text of only such statutory provisions, as, it is believed, will be found most useful in criminal trials and references to the others. It is earnestly hoped by the author, that he has succeeded in thus furnishing a useful guide and help to practitioners and others interested in the administration and study of the criminal law in this State.

LEWIS HOCHHEIMER.

BALTIMORE, February 15th, 1889.

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A MANUAL OF

CRIMINAL LAW,

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CHAPTER I.

Crime and its Divisions.

§ 1.—**Definition.**—Criminal law treats of those cases which the government notices as injurious to the public, and punishes, in what is called a criminal proceeding, in its own name.[1] A crime may be defined to be a public wrong, or one that affects, in its immediate operation or its consequences, the interests, peace, dignity or security of the public. Hence, it is required by the Constitution of this State, that all indictments shall conclude, "against the peace, government and dignity of the State."[2]

§ 2.—**What Proceedings are Classed as Criminal.**—The line of distinction between the criminal and civil departments of the law is one not at all points clearly defined, and there is a conflict of rulings in this regard.[3] Questions bearing on this distinction have arisen in this State on a number of occasions.

A proceeding by indictment against the father of an illegitimate child, under the bastardy acts,[4] in which, if found guilty, the court adjudges him to give security to indemnify the county from any charges that may accrue

[1] 1 Bish. Cr. L. § 32.
[2] Const. art. 4, sec. 13.
[3] 1 Bish. Cr. L. §§ 32, 33.
[4] Code, art. 12.

for the maintenance of the child, and, if he neglect or refuse to comply, to stand committed until he shall comply, is a criminal proceeding. It is so treated and classed by the statute, and the fact that the design of the law, in the punishment inflicted, is to indemnify the county does not at all change the character of the proceeding.[1]

Proceedings of inquisition, by one or more justices, with an award of restitution, in cases of forcible entry and detainer, under Stat. 8 H. 6, ch. 9, form a part of our criminal, not civil jurisprudence.[2]

Actions of debt, instituted in the name of the State to recover fines imposed for misdemeanors, are held to be but civil actions *inter partes*. "Although the object of their institution is the recovery of fines and penalties, yet, in contemplation of law, they are as much regarded as civil actions as if, instead of actions of debt, they had been actions for money had and received."[3] It was, therefore, ruled, that a constitutional provision, that no person shall be compelled, in any criminal case, to be a witness against himself, has no application to such proceedings.[4] Yet, it has been further held, that, as the debt or obligation was imposed by way of punishment for crime, the proceeding, although civil in form, was not entirely governed by rules applicable to civil proceedings, and that the defendant might be imprisoned for non-payment of the fine without violating the constitutional prohibition of imprisonment for debt.[5]

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[1] Oldham *v.* State, 5 G. 90: State *v.* Phelps, 9 Md. 21; Bake *v.* State, 21 Ib. 422

[2] Isaac *v.* Clarke, 9 G. & J. 107.

[3] Day *v.* State, 7 G. 321.

[4] Day *v.* State, *supra*.

[5] State *v.* Mace, 5 Md. 337.

So in England, upon an indictment for a nuisance for obstructing the navigation of a river in connection with some works which the defendant carried on near the banks, it was held, that, as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, the evidence that would support a civil action would be sufficient to support an indictment. Reg. *v.* Stephens. L. R. 1 Q. B. 702: S. C., 35 L. J. M. C. 251: S. C., 12 Jur. N. S. 961; S. C., 14 L. T. 593: S. C., 14 W. R. 859; S. C., 7 B. & S. 710. See 1 Bish. Cr. L. § 1076.

§ 3.—**Police Powers of Municipal Corporations.**—Proceedings to punish certain classes of offenders against the good order of municipal townships are likewise to be distinguished from the ordinary classes of criminal actions. "It would be next to, if not quite impossible, for a large city like Baltimore to preserve order within its limits, preserve the streets free from interruption, indeed do most of the thousand things necessary to be done to carry out its various and indispensable operations, if in every case it were a necessary preliminary that the offender should be regularly prosecuted, by presentment, indictment and trial. It has always been understood that, under the police power, persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportions the administration of the judicial power, strictly as such. The punishment is for an offense against the decency and morals of the municipality and does not wipe out all responsibility for the offense to the dignity and sovereignty of the State."[1]

§ 4.—**Classification of Crimes—Treason.**—Crimes, according to their degree of turpitude, are divided into treasons, felonies and misdemeanors. These divisions are technical, but most important.[2] Treason, the most heinous of these classes, was divided into petit and high treason. But now, what is meant by treason is high treason. By the ancient common law, there were several forms of petit treason, which, by 25 Edw. III, Stat. 5, ch. 2, were reduced to three. They were the killing, by a servant, of his master; the killing, by a wife, of her husband; the killing of a prelate by an ecclesiastic owing obedience to him. In 1828, these petit treasons were abolished by 9 Geo. IV, ch. 31, § 2, providing, "that every offense which, before the commencement of this act, would have amounted to petit treason, shall be deemed to be murder only."[3] In this

[1] Shafer *v.* Mumma, 17 Md. 331. See Cooley Const. Lim., 5 ed., 242, n. 1.

[2] 1 Bish. Cr. L. § 609.

[3] This provision is continued by 24 & 25 Vict. c. 100, § 8.

State it was provided by the Act of 1809, ch. 138, § 3, "that every person liable to be prosecuted for petit treason shall in future be indicted, proceeded against and punished as is directed in other kinds of murder, according to the degree."[1] The various acts constituting treason in this State are defined by statute.[2]

§ 5.—Same Subject—Felony.—Felony, the next in grade of turpitude, is defined to be any offense which, by the statutes or the common law, is punishable with death, or to which the old English law attached total forfeiture of lands or goods, or both.[3] Even where a statute is not express, a felony may be created by necessary implication; but an offense can never be made a felony by any doubtful or ambiguous words.[4] If, by the terms of a statute, the infliction of the punishment of death is discretionary, the offense is not felony but misdemeanor.[5]

§ 6.—Same Subject—Misdemeanor.—All crime less than felony is misdemeanor. The term is generally used in contradistinction to felony, and comprehends all indictable offenses which do not amount to felony. The term may be considered as and, in fact, is a *genus*, which contains under it a great number of *species* almost as various in their nature as human actions.[6]

§ 7.—Infamous Crimes.—Any person convicted of an infamous crime, unless pardoned by the Governor, thereby becomes disqualified as a voter,[7] and such a conviction may be given in evidence in any case to affect the credibility of a witness.[8] It is, therefore, deemed well to note here the meaning of this term. An infamous crime is such a crime as involved moral turpitude, or such as rendered the offender incompetent as a witness in court, upon the theory that a person would not commit so heinous a crime, unless he were so depraved as to be unworthy of credit. It

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[1] Code, art. 27, sec. 215.
[2] Ib., art. 27, secs. 264-272.
[3] 1 Bish. Cr. L. § 615.
[4] Ib., § 622.
[5] Gibson *v.* State, 54 Md. 447, 453.
[6] State *v.* Phelps, 9 Md. 21.
[7] Const. art. 1, sec. 2.
[8] Code, art. 35, sec. 5.

may, in general, be said to include treason, felony and all offenses of the grade of misdemeanor founded in fraud and coming within the general notion of the *crimen falsi* of the Roman law.[1] Offenses punishable by imprisonment in the Penitentiary do not necessarily come within this class.[2]

§ 8.—**Attempts.**—An act towards an indictable wrong, if prompted by an intent to do it, partakes of the culpability of the doing. Therefore an attempt, or an intent to do a particular criminal thing with an act toward it, falling short of the thing intended, is classed as a crime. Every attempt to commit any crime, whether treason, felony or misdemeanor, existing either at the common law or under a statute, is indictable as a misdemeanor. Any form of act apparently adapted for the purpose is sufficient, but such act should be sufficient, both in magnitude and proximity to the fact intended, to be taken cognizance of by the law.[3]

§ 9.—**Degrees of Participation.**—In treason as well as misdemeanor all participants are principals. There are misdemeanors of such a nature and so small in turpitude that even a person present and lending the support of his will to the commission of the act is, nevertheless, not punishable;[4] but the general rule is, that a participation in the act committed, in any way, makes the party liable as principal, and the act, though only commanded to be done, may be charged as done by the principal, without reference to the agent.[5]

§ 10.—**Same Subject—Principal and Accessory.**—In felony there are four different methods of participation in the crime which make the participant a felon. He may be a principal of the first degree, a principal of the second degree, an accessory before the fact, or an accessory after the fact.

Principal of the first degree is one who does the act, either by himself directly or by means of an innocent agent.

[1] 1 Greenl. Ev. §§ 372, 373; Black *v.* State, 2 Md. 376, 380; State *v.* Bixler, 62 Ib. 354.

[2] State *v.* Bixler, *supra*.

[3] 1 Bish. Cr. L. § 728; Lamb *v.* State, 67 Md. 524.

[4] 1 Bish. Cr. L. §§ 657, 658.

[5] Roddy *v.* Finnegan, 43 Md. 490; Carroll *v.* State, 63 Ib. 551.

Persons who are either actually or constructively present at the commission of an offense, aiding and abetting, or counseling and procuring the same to be done, are principals in the second degree.

The aider and abettor must participate in the felony, in the sense of acting in concert with those committing it, for, although he is present, yet, if he does not participate, but remains passive, he is not an abettor. Moreover, the participation must be with a felonious intent, and not in ignorance of the nature of the act. The distinction between principal in the first and in the second degree is a purely technical one and is without practical effect.[1]

An accessory before the fact is one who, directly or indirectly, counsels, procures or commands any person to commit a crime which is committed in consequence of such counseling, procuring or commandment. An accessory before the fact can only be tried jointly with the principal, or after the conviction of the principal, whose acquittal also acquits him.[2]

Every one is an accessory after the fact who, knowing the crime to have been committed by another, receives, comforts or assists him, in order to enable him to escape from punishment, or rescues him from an arrest for crime, or, having him in custody for the crime, intentionally and voluntarily suffers him to escape, or opposes his apprehension. The principal must be tried and convicted first; but, in various circumstances, an accessory after the fact may be held guilty of a substantive crime, for which he may be tried and convicted independently of the principal. Thus, one mode of helping a felon is to rescue him from lawful confinement, either before or after his conviction; and the rescuer may be indicted for the substantive offense of rescue or for being an accessory after the fact in the other's felony, at the election of the prosecutor.[3]

§ 11.—Receiving.—A receiver of stolen goods, knowing them to be stolen, is not within the definition of an accessory, because he renders no personal help to the thief. At

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[1] 1 Bish. Cr. L. § 648.
[2] Ib., § 667.
[3] Ib., § 697.

common law the receiver is guilty of a misdemeanor. In England, by Stat. 3 W. & M., ch. 9, § 4, the receiver was made an accessory after the fact and, hence, could not be convicted, unless the principal felon was. If the principal felon escaped or was kept out of the way, the receiver went unpunished. Stat. 5 Anne, ch. 31, § 5, confirmed the former statute, and § 6, as also 1 Anne, Stat. 2, ch. 9, § 2, provided, that where the principal felon could not be taken, the receiver of the stolen goods might be prosecuted separately for the misdemeanor. These statutes extended to Maryland, and, in addition, it was provided by the Act of 1809, ch. 138, § 6,[1] that the receiver may be prosecuted and punished, although the principal offenders shall not have been convicted. It was held in *Wilkes' Case*[2] by the twelve Judges, that a receiver of stolen goods might be prosecuted and convicted of the offense as a misdemeanor, although the principal felon was known, unless it appeared from the finding of the jury, that the principal was out of custody by collusion, and could have been taken and convicted when the indictment against the receiver was found, and this ruling has been followed in Maryland.[3]

§ 12.—**Compounding.**—Compounding a felony is the act of a party immediately aggrieved who agrees with a thief or other felon that he will not prosecute him, on condition that he returns to him the stolen goods, or who takes a a reward not to prosecute.[4] Where a party is robbed, and he knows the felon and takes his goods again or other amends, upon agreement not to prosecute, such compounding was anciently called *theft-bote*, and a party so compounding the felony was considered an accessory after the fact,[5] contrary to the later and present law.[6]

The offense ordinarily applies to felonies, but, strictly speaking, to agree for a valuable consideration to forbear or to stifle any criminal prosecution, whether treason, felony

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[1] Code, art. 27, sec. 234.

[2] 1 Leach, 107.

[3] State *v.* Hodges, 55 Md. 127. Cf. 1 Bish. Cr. L., § 699.

[4] State *v.* Duhammel, 2 Harr. (Del.) 532; Bothwell *v.* Brown, 51 Ill. 234; Chandler *v.* Johnson, 39 Ga. 85.

[5] 4 Bl. Comm. 133.

[6] 1 Bish. Cr. L. § 710.

or misdemeanor, is a misdemeanor,[1] and under Stat. 18 Eliz., ch. 5, which is in force in this as in most other States,[2] it is made an offense for any person informing under a penal statute to compound with the offender without leave of Court.

A misdemeanor, however, may be so small or bear so much of the nature of a private injury as will render the compounding of it not indictable.[3] In the language of Blackstone,[4] "It is not uncommon, when a person is convicted of a misdemeanor which principally and more immediately affects some individual, as a battery, imprisonment or the like, for the court to permit the defendant to *speak with* the prosecutor before any judgment is announced, and, if the prosecutor declare himself satisfied, to inflict but a trivial punishment." In this State such cases are provided for by statute:[5]

> In cases where recognizances to prosecute have been entered into, and before presentment or indictment found, the several courts of this State, having jurisdiction of crimes and offenses, upon motion of the State's attorney, with the consent of the parties injured and accused, may compromise any assault and battery, the party accused paying the same costs as would have been incurred by the finding a true bill and plea of guilty, provided, such courts shall consider it proper in reference to the peace of the State so to do.

§ 13.—**Misprision.**—Misprision of treason or felony is a criminal neglect, either to prevent the treason or felony from being committed or to bring to justice the offender after its commission. The grade of this offense is misdemeanor. Misprision, as a substantive offense, is said to be practically obsolete.[6]

§ 14.—**Merger.**—Merger occurs in criminal law, where the same act of crime is within the definition of a misde-

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[1] 1 Bish. Cr. L. § 711; 1 Whart. Cr. L., 8 ed., § 1559.

[2] Alex. Br. Stat. 406.

[3] 1 Bish. Cr. L. § 711.

[4] 4 Comm. 363.

[5] Code, art. 10, sec. 19.

[6] 1 Whart. Cr. L., 8 ed., § 249. Cf. 1 Bish. Cr. L. §§ 716-721.

meanor and likewise of a felony, or of a felony and likewise of treason, and the rule is, that the lower grade of offense merges in the higher, so that the act can be punished only as felony in the one instance or treason in the other. Hence, under the common law doctrine, if a statute creates a felony of what was before a misdemeanor, or a misdemeanor of what was before a felony, there can be no subsequent prosecution of the act for what it was before the statute.[1] The law in this respect has been changed by the following statute provision:[2]

> All indictments for offenses forbidden by any statute or statutes or for offenses the punishment of which is contained in the same clause of any statute with the prohibition of the offense may conclude as for offenses at common law; and, where any offense which is a misdemeanor at common law may have been made a felony by statute, the misdemeanor shall not be merged in the felony, but the indictment may contain counts for the said felony and also for the misdemeanor.

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[1] 1 Bish. Cr. L. §§ 786–790.

[2] Code, art. 27, sec. 287.

CHAPTER II.

Criminal Capacity and Responsibility.

§ 15.—**Corporations.**—A corporation may be indicted for neglect or non-feasance, as for not repairing a road or bridge or a wharf, where the duty to do so is cast upon it by law; also for an act of malfeasance coming within the scope of the corporate duty, as for a nuisance in obstructing a highway or river; but a corporation cannot be guilty of treason or felony, or crimes involving violence or immorality, or offences which derive their character from a corrupt mind. The limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation and the extent of its powers in the special matter.[1] Though a corporation is indictable for a particular wrong, still the individual members and officers who participate in it may be also for the same act.[2]

§ 16.—**Infants.**—Every person is, at the common law, considered an infant until he has attained the age of twenty-one years, and this period is adopted in this State and the United States generally, the full age of twenty-one years being computed to be completed on the first instant of the day preceding the twenty-first anniversary of his birth.[3] The word *minor* bears the same meaning as infant[4] and is used interchangeably with the latter expression in our statute law. Although in the case of female infants an enlarged capacity to act in certain matters is conferred by statute, they are not, upon such account, considered as being of full age before twenty-one.[5] Under seven years,

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[1] 1 Bish. Cr. L. §§ 417-424; 1 Whart. Cr. L., 8 ed., §§ 91-93; Germania *v.* State, 7 Md. 1; P. W. & B. R. R. *v.* State, 20 Ib. 157; Mayor *v.* State, 30 Ib. 112; Chesapeake Club *v.* State, 63 Ib. 446.

[2] 1 Bish. Cr. L. § 424; Seim *v.* State, 55 Md. 566.

[3] Co. Litt. 79; State *v.* Clarke, 3 Harr. Del. 557.

[4] Bouv. Law D. and Abbott Law D., title "Minor."

[5] Waring *v.* Waring, 2 Bl. 673; Greenwood *v.* Greenwood, 28 Md. 369.

an infant is deemed conclusively incapable of committing any crime.[1] Between the ages of seven and fourteen, an infant is presumed to be *doli incapax;* but the presumption may be overcome by proof of guilty knowledge of wrong-doing.[2] Such proof, however, ought to be "strong and clear, beyond all doubt and contradiction."[3] In cases of rape the law conclusively presumes a boy under fourteen years of age impotent as well as wanting discretion, so that evidence is not admissible to show that in fact he had arrived at the full state of puberty and could commit the offense.[4] The same rule, applies to the offense of assault with intent to rape.[5] Above the age of fourteen criminal responsibility attaches to infants as in the case of adults.

§ 17.—Coverture.—The doctrine in relation to the criminal responsibility of *femes covert* has been explained in this State as follows:[6]

"The common law, assuming that the free agency of a married woman is merged in the dominion of her husband, presumes that, if a wife act in company with her husband in the commission of a felony, other than treason or homi-

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[1] 1 Inst. 2; 1 Hale, 19, 20; 4 Bl. Comm. 23; Marsh *v.* Loader, 14 C. B. N. S. 535; R. *v.* Giles, 1 Moody C. C. 166; R. *v.* Inhabitants of King's Langley, 1 Str. 631; People *v.* Townsend, 3 Hill N. Y. 479.

[2] 1 Hawk. c. 1, s. 8; 4 Bl. Comm. 23; R. *v.* Owen, 4 C. & P. 236; R. *v.* Groombridge, 7 Ib. 582; R. *v.* Vanplew, 3 F. & F. 520; R. *v.* Smith, 1 Cox C. C. 260; R. *v.* Manley, Ib. 104; State *v.* Goin, 9 Humph. 175; State *v.* Pugh, 7 Jones N. C. 61; State *v.* Guild, 10 N. J. L. 163; Godfrey *v.* State, 31 Ala. 323; State *v.* Doherty, 2 Tenn. 80; Comm. *v.* Mead, 10 Allen, 398; State *v.* Learnard, 41 Vt. 585; Willet *v.* Comm., 13 Bush, 230; State *v.* Fowler, 52 Iowa, 103.

The *onus* of proof as to his age has been held to lie on the prisoner, as the reputed age of every one is peculiarly within his knowledge. State *v.* Arnold, 13 Ired. 184.

[3] 4 Bl. Comm. 24.

[4] 1 Hale, 630; R. *v.* Eldershaw, 6 C. & P. 396; R. *v.* Groombridge, *supra;* R. *v.* Phillips, 8 C. & P. 736; R. *v.* Jordan, 9 Ib. 118; R. *v.* Brimilow, Ib. 366; S. C., 2 Moody, 122; Comm. *v.* Green, 2 Pick. 380; State *v.* Handy, 4 Harr. Del. 566. *Contra*, People *v.* Randolph, 2 Park. C. C. 174; Williams *v.* State, 14 Ohio, 222; O'Meara *v.* State, 17 O. St. 515; Moore *v.* State, Ib. 521.

[5] R. *v.* Phillips, *supra;* R. *v.* Groombridge, *supra;* R. *v.* Eldershaw, *supra*. *Contra*, Comm. *v.* Green, *supra*.

[6] Nolan *v.* Traber, 49 Md. 460.

cide, she acts under his coercion and, consequently, without any guilty intent. Sir William Blackstone said, this doctrine was at least a thousand years old in England, being found among the laws of King Ina, the West Saxon. An eminent jurist, in a recent work, says, this presumption may now be rebutted by positive proof that the woman acted as a free agent, and, in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them.[1] The relation of husband and wife, however absolute in the past, no longer implies such subserviency of the latter as to make her the slave of her husband. By gradual modifications of the common law, the wife has become, in a great measure, the peer of her husband in the control of her property and person, enjoying exemptions and privileges which raise her above all suspicion of moral constraint, except in rare instances. The legal status of the wife, although legally inferior in respect of the *jus disponendi* of some species of property and subjection to marital rights, is yet so elevated as to protect her from all necessity of compliance with the husband's will in matters *mala in se*. The better opinion would seem to be, that the presumption of coercion by the husband in cases of indictments or prosecutions against husband and wife jointly is only *prima facie*, subject to be controlled by evidence that the wife intervened voluntarily and not by compulsion."[2]

The general rule as given by a leading American textwriter may be thus stated:[3]—Actual constraint imposed by a husband on his wife will relieve her from the legal guilt of any crime whatever, when the act is done in his presence, *i. e.*, within the range of his personal and present influence. Exceptions are offenses which show so much malignity as to render it improbable that a wife would be constrained by her husband without the separate opera-

[1] R. *v.* Stapleton, 1 Jebb C. C. 93; Taylor Ev., 6 ed., 191.

[2] R. *v.* Hughes, 1 Lewin C. C. 229; R. *v.* Pollard, 8 C. & P. 553; R. *v.* Stapleton, *supra;* 1 Greenl. Ev. § 28, n. 5; 3 Ib., § 7.

[3] 1 Bish. Cr. L. §§ 356-366.

tion of her own will into their commission and those which, while of less magnitude, women are supposed peculiarly to participate in. Of the aggravated offenses are treason, probably murder, possibly robbery, and, it may be, the list should be even more extended. Of the offenses peculiar to the female sex is the keeping of brothels and other disorderly houses.[1]

A wife can not be made an accessory after the fact to her husband's felony, though harboring him with knowledge of it; but this is upon the principle that she is not punishable for comforting and assisting her husband rather than upon the ground of supposed coercion.[2]

§ 18.—**The Doctrine of Evil Intent.**—Crime can not exist without a criminal mind, without the concurrence of a wrongful act and a conscious, wilful mental design in the perpetration. The doctrine requiring an evil intent to bring any action within the sphere of criminality is fundamental and unvarying, admitting of no exception or modification. It derives its force not alone from universal or well-nigh universal acceptance in the legal systems of the various nations, but it is founded in the religious and moral sentiment of mankind, which condemns the infliction of punishment upon one who trangressed not in his heart as unjust and oppressive. "The calm judgment of mankind keeps this doctrine among its jewels. In times of excitement, when vengeance takes the place of justice, every guard around the innocent is cast down. But with the return of reason comes the public voice, that, where the mind is pure, he who differs in act from his neighbors does not offend."[3] If a case is really criminal, if the end sought is punishment and not the redress of a private wrong, no circumstances can render it just or consistent with a sound jurisprudence for the court or a jury to pro-

[1] It is, moreover, in this State, expressly provided by statute that, whenever a license shall have been issued to a *feme covert* to trade or to sell spirituous or fermented liquors, she may be sued or indicted and prosecuted, in case of a violation by her of the license law of this State, or in case she should keep a disorderly house, as if she were a *feme sole*. Code, art. 56, sec. 36.

[2] Reg. *v.* Good, 1 C. & K. 185; Reg. *v.* Manning, 2 Ib. 887, 903.

[3] 1 Bish. Cr. L. § 289.

nounce against the defendant unless he was guilty in his mind.[1]

§ 19.—**Ignorance of Law.**—Mere ignorance of the law, however will not excuse the offender. *Ignorantia juris non excusat.* Ignorance of the law, whether in a civil or criminal action, affords no defense, and evidence of such ignorance is inadmissible.[2] This applies as well to *mala prohibita* as *mala in se.* Thus, upon an indictment for violating the license laws relating to the sale of spirituous liquors, the fact that a party supposed that he had a lawful right to sell in a certain way or that he acted under the advice of counsel is no answer to the charge.[3]

§ 20.—**Ignorance of Fact.**—The general rule is, that ignorance or mistake in point of fact is in all cases of supposed offense a sufficient excuse. *Ignorantia facti excusat.* But it must be a mistake of fact "neither induced nor accompanied by any fault or omission of duty."[4] The case of Carroll *v.* State[5] affords an illustration.

This case arose upon an indictment against a licensed dealer in spiritnous liquors who was charged with unlawfully selling liquor to a minor. The sale was made by the appellant's bar tender, out of the presence of the appellant and without his knowledge of this particular sale. The appellant offered to prove, that he had given instructions to the barkeeper, in good faith, not to sell to minors, and that these instructions were understood by the latter to be *bona fide*, and that he would not intentionally have violated them, and that the appellant had no idea of their violation in this or any other case. This proof was held to be inadmissible.

"The question here is," said the Court, "whether, when the agency for the transaction of the business of selling liquors generally is established and admitted and, in the conduct of that business, a prohibited sale is made by the agent to a minor, the principal may shield himself from liability on the ground that his agent violated his general

[1] 1 Bish. Cr. L. § 291.

[2] Grumbine *v.* State, 60 Md. 355: Slymer *v.* State, 62 Ib. 237; Mincher *v.* State, 66 Ib. 227, 236.

[3] Forwood *v.* State, 49 Md. 531.

[4] 1 Bish. Cr. L. § 303.

[5] 63 Md. 551. Cf. State *v.* Probasco, 62 Iowa, 400.

instructions and did not inquire or was deceived by the purchaser as to his age. The question is, whether, while deriving the profit from the sale, the principal can delegate *his duty* to know that a purchaser is a lawful one to the determination of an agent and be excused by the agent's negligence or error."

"The law for a violation of which this appellant has been indicted is a police regulation of a very stringent character. It is in these words: 'If any person shall sell any spirituous or fermented liquors or lager beer to any person who is a minor under twenty-one years of age, he shall, on conviction, pay a fine of not less than fifty dollars nor more than two hundred dollars, together with the costs of prosecution, and, upon failure to pay the same, shall be committed to gaol and confined therein until such fine and costs are paid, or for the period of forty days, whichever shall first occur, and it shall be the duty of the court before whom said person shall be convicted to suppress his license.' For the violation of a statute of this nature it is not necessary to allege the *scienter* in the indictment, because it is not made an ingredient by the statute, that the thing shall be *knowingly* and *wilfully* done to make the violation of the statute an offense. As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of the law will not excuse.[1] Where an act, if done knowingly, I would be *malum in se*, ignorance, which excludes the idea of intentional wrong, it seems, will excuse; but, Mr. Greenleaf says, in section 21 of Volume 3 of his work on *Evidence*, 'where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of thing contemplated by the statute, it seems, will not excuse its violation.' He adds: 'Such is the case in regard to fiscal and police regulations, for the violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in those cases seems to bind the party to know the facts and to obey the law at his peril.' In the note to this section, instances are given where such rule

[1] 3 Greenl. Ev. §§ 20, 21.

applies; and it is said to apply to the sale of any article the sale of which is prohibited, and it has been held to be no excuse that the vender did not know it was the prohibited article. The sale of spirituous liquors, where prohibited, is specially mentioned as within this rule, as also the allowance of minors to play at billiards, where that is prohibited. This doctrine is maintained in *Comm. v. Emmons*,[1] *McCutcheon v. People*,[2] *Barnes v. State*,[3] *State v. Hartfield*,[4] *Ulrich v. Comm.*,[5] and in very many other cases in Massachusetts and other States. It is upon the ground that intention is not an essential ingredient of the offense that the principal is held bound for the act of his agent in violation of law whilst pursuing his ordinary business as agent. Being engaged in business where it is lawful to sell to all persons except such as are by law excepted, it is his *duty* to know, when a sale is made, that it is to a properly situated person. Therefore, it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and, if he does not do so, the law holds him answerable."

"The leading case of *R. v. Gutch*,[6] cited in 1 Tayl. Ev., 827, states the law as it is now generally received. The prosecution was for a libel. Lord Tenterden says: 'A person who derives profit from and who furnishes the means for carrying on the concern and entrusts the business to one in whom he confides may be said to have published himself and ought to be answerable.' In *Reg. v. Bishop*[7] the defendant was convicted of receiving into her house two or more lunatics, not being a registered asylum or house duly licensed by law. The jury found specially, that the defendant *honestly and on reasonable grounds believed* that the persons received into her house were not lunatic, though the jury found they were lunatic. The point, being re-

[1] 98 Mass. 6.
[2] 69 Ill. 606.
[3] 19 Conn. 398.
[4] 24 Wis. 60.
[5] 6 Bush, Ky. 400.
[6] M. & M. 433.
[7] L. R. 5 Q. B. D. 259; 14 Cox C. C. 404; 49 L. J. M. C. 45; 28 W. R. 475; 42 L. T. 240; 44 J. P. 330.

served, was heard before Coleridge, Denman, Stephen, Pollock and Field, all of whom affirmed the conviction, holding that such belief was immaterial. The Court held, that, to hold otherwise, would frustrate the object of the statute. In *Redgate v. Haynes*[1] the appellant was charged with *suffering gaming* to be carried on upon her premises. She had retired for the night, leaving the house in charge of the hall porter, who withdrew his chair to a part of the hotel remote from the guests, and did not see the gaming. It was held that the landlady was answerable. The same principle was maintained in *Mullins v. Collins*,[2] where a servant of a licensed victualer supplied liquor to a constable on duty without authority from his superior officer. The Court held, that the licensed victualer was answerable, though he had no knowledge of the act of his servant. So, also, in a more recent case in the Queen's Bench, *Caudy v. Le Cocq*,[3] where a person was convicted under the Licensing Act of 1872 of having sold liquor to a drunken person, the question was reserved, whether, as it was proved that neither the defendant nor his servants knew the man was drunk, and there were no indications of his being intoxicated and they had no means of knowing, he could be convicted. The Court, through Judge Stephen, affirmed the conviction, holding that it was no defense against conviction and was only a ground for mitigation in punishment. In *McCutcheon v. People*[4] the indictment was for the same offense as that charged in this case, and the Court lay down the law as we think it is and ought to be, as the logical result of the immateriality in such case of criminal intent, as all the cases we have cited establish. The Court says, 'this construction imposes no hardship on the licensed seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale. If he violates either clause of the statute, he must suffer the penalty of its violation. It is no answer to this view to say, the licensee

[1] L. R. 1 Q. B. D. 89; 45 L. J. M. C. 65; 33 L. T. 779.

[2] L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 22 W. R. 297.

[3] L. R. 13 Q. B. D. 207; 57 L. J. M. C. 125; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599.

[4] *Supra.*

may sometimes be imposed on and made to suffer, when he had no intention to violate its provisions. This is a risk incident to the business which he undertakes to conduct, and, as he receives all the gains connected therewith, he must assume all the hazards.' The Court adds, that it is immaterial whether the sale was made by the appellant or an agent, and that, if made by an agent, the presumption is conclusive, that he acted within the scope of his authority. 'When the agent, as in this case, is set to do the very thing which and which only the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on that business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a *bona fide intent* to obey the law, which, all the authorities say, is immaterial in determining guilt. The court may regard such fact in graduating punishment, when it has a discretion.'[1]

§ 21.—**Mental Incapacity.**—Questions connected with the effect of mental infirmity upon the responsibility of persons laboring thereunder form one of the most difficult portions of criminal jurisprudence. It is universally conceded, that sanity, or mental soundness, is an essential ingredient in crime; but the application of the doctrine to particular cases has produced a great conflict of judicial opinion and variety of ruling, rendering the study of this subject difficult and perplexing. A few suggestions and views will be here set forth which, it is hoped, will prove helpful in the study of the subject.

Whatever is unavoidable is no crime.[2] Hence, when, *from any cause*, there is a lack of mental capacity to entertain a criminal intent, there can be no guilt; or, as the doctrine has been otherwise expressed, in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose. And, if his reason and mental powers are so deficient that he has no will, no conscience or controlling mental power, or if, through the

[1] See also Bond *v.* Evans, L. R. 21 Q. B. D. 249.

[2] Ruth. Inst. c. 18, § 9; 1 Bish. Cr. L. § 346.

overwhelming violence of mental disease, his intellectual power is, for the time, obliterated, he is not a responsible moral agent and is not punishable for criminal acts.[1] The party need not be an idiot or maniac, raving mad or sunk in mental stupor, in order to be exempt from responsibility or to come within the legal definition of insanity. In the criminal law, insanity, according to a leading text-writer, is any defect, weakness or disease of mind rendering it incapable of entertaining the criminal intent which constitutes one of the elements in every crime.[2] According to another exposition, entirely in accord with this definition and the views above set forth, the true test lies in the word *power:* has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong—has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body and his estate.[3]

The law can go no farther than to establish such general tests of criminal responsibility. The multiform shapes which mental disease assumes preclude the possibility of anything like an approximately accurate definition or satisfactory enumeration of the symptoms and appearances that betoken an unsound mind. The disorder which we call insanity is a mystery not yet unraveled.[4] In principle, the law is and must be, that whether, in a particular instance, the act alleged to be a crime proceeded from a sane or insane mind, is a question of fact, while still, in practice, the directions to jurors should extend to various explanations differing with the particular cases.[5] The question of fact in such cases is among the most abstruse and delicate in the range of legal investigation, and the utmost care and painstaking judgment should be brought to bear upon its determination. On the one hand, the claims of justice must not be allowed to suffer defeat through a false plea, and, on the other hand, the danger which we underlie of rejecting, in our imperfect knowledge

[1] Comm. *v.* Rogers, 7 Metc. 500.
[2] 1 Bish. Cr. L. § 381.
[3] 4 Am. L. Rev. 240.
[4] Blandford, Insanity and Its Treatment, p. 1.
[5] 1 Bish. Cr. L. § 383.

and through mere want of understanding, a valid defense, should not be lost sight of. "The memorials of our jurisprudence," says Mr. Bishop, "are written all over with cases in which those who are now understood to have been insane were executed as criminals."[1]

§ 22.—Same Subject—Moral Insanity.—This subject was considered in the case of *Spencer v. State*,[2] and it was there held, that what is known as moral insanity, or lesion of the will, as an independent state or condition, must be declared to have no place in the law. Moral insanity is not admitted as a bar to responsibility, for civil or criminal acts, except in so far as it may be accompanied by intellectual disturbance. If the party accused be competent to form and execute a criminal design, or, in other words, if, at the time of the commission of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act, as applied to himself, he is a responsible agent and amenable to the criminal law of the land for the consequences of his act.

Spencer was indicted for murder. The homicide was fully proven and was admitted by him. His offer of proof was as follows:

"To prove by himself that, in July, 1884, his wife died, and that, previous to her death, she had frequently complained to him of illness, the cause of which she attributed to a felonious assault made upon her by the deceased; that the traverser believed, the said assault was the immediate cause of her death, and that this fact fastened itself upon his mind to the exclusion of all other thoughts; that, from the death of his wife to the date of the homicide, he was nervous and restless, and that it was impossible for him to remain long at one employment, by reason of this condition; that the dead body of his wife, with the scars inflicted by the deceased, would appear to him in his dreams, and he was constantly followed and haunted by the idea, that, so long as the deceased lived, he the traverser, would have no peace or rest of mind, and that he could exercise no power

[1] 1 Bish. Cr. L. § 390.
[2] 69 Md.

of will or self-control over his idea; and that, since the death of Dawson, the traverser has found rest and peace and quiet."

This evidence was held, by both the lower and the appellate courts, to be inadmissible, for the reasons given, unless it were to be followed up by proof tending to show that, at the time of the shooting, the prisoner was insane or deranged and thereby irresponsible for his acts. The evidence was held to be inadmissible both as tending to show insanity of the prisoner and as affecting the degree of the crime.[1]

§ 23.—**Drunkenness.**—Voluntary intoxication furnishes no excuse for crime committed under its influence; but insanity, whether permanent or intermittent, when produced by drunkenness, is regarded in the same light as mental incapacity from any other cause. In cases, however, where any particular intent is a necessary element of the offense charged, the fact of intoxication becomes material in ascertaining the state of mind of the accused. Thus, when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury.[2] So, the state of mind produced by intoxication may be considered by the jury in determining whether there was malice or not, and whether the killing was manslaughter or murder; whether, in cases of larceny, the taking was *animo furandi;* whether, in cases of forgery, the *scienter* is proven; and, generally, as to

[1] Bryan, J., delivered a dissenting opinion, holding that, as the entire question of guilt or innocence is, in this State, committed to the finding of the jury, and as malice is an indispensable element of the crime of murder, the facts offered in proof, while not showing that the prisoner was lunatic or insane, and not making out a case of irresponsibility for crime, were pertinent to the inquiry whether he had that "sedate, deliberate mind and formed design" which are essential to express malice, and should, therefore, have been admitted.

[2] Hopt *v.* People, 104 U. S. 631.

questions of intent, purpose or motive.[1] Intoxication, *per se*, can be said neither to aggravate nor to palliate crime; but the condition of mind produced by intoxication often becomes material in determining the existence of a criminal intent, and, hence, the criminality of an act.

[1] 1 Bish. Cr. L. §§ 408-416; Hopt *v.* People, *supra;* 23 Am. L. Reg N. S. 217; 21 Centr. L. J. 191; Reg. *v.* Doherty, 16 Cox C. C. 306.

CHAPTER III.

Constitutional Guarantees.

§ 24.—**Scope of Chapter.**—The safeguards thrown around the lives and liberties of the citizen by the organic laws of the various states constitute an important part of criminal jurisprudence in the United States. No such discussion as the one undertaken in this work would be adequate without some notice of the bearing of these provisions upon the rights of persons accused of crime. The subject is well and fully discussed in various text-books, and it is purposed in the following sections of this chapter merely to give the law embodied in constructions placed upon the State constitution or upon statutes of this State in regard to their validity under the State or Federal constitution.

§ 25.—**Construction of Constitution.—General Rule.**—The practice in this State has been for the Court of Appeals not to pass judgment upon the constitutionality of an act of the Legislature, unless such judgment is necessary for the decision of the case before it.[1]

The Constitution should have a common sense interpretation, by which is meant the sense understood by those who adopted it. Although it is a well recognized law of construction, that, where legal terms are used in a *statute*, they are to receive their technical meaning, unless the contrary plainly appears to have been the intention of the

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[1] State *v.* Insley, 64 Md. 28.

Every intendment should be made in support of a legislative enactment, and it should not be declared invalid except for the plainest and most conclusive reasons. Fell *v.* State, 42 Md. 71. When, however, an act contravenes the Constitution, it is simply null and void. An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed. Norton *v.* Shelby County, 118 U. S. 425, 442.

legislature, this principle does not apply to the interpretation of the *organic law*, which is to be construed according to the acceptation of those who adopted it.[1]

§ 26.—**Criminal Prosecutions—Fundamental Rights.**—The Declaration of Rights of this State contains the following provisions:

> That, in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."[2]
>
> That no man ought to be compelled to give evidence against himself in a criminal case.[3]
>
> That no man ought to be taken or imprisoned or disseised of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land.[4]
>
> That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the courts of law.[5]

§ 27.—**Summary Proceedings.**—The meaning of several of the provisions above cited was explained by the Court of Appeals in the case of *State v. Glenn*,[6] which arose upon the construction of the Act of 1878, ch. 415, s. 10, confer-

[1] State *v.* Mace, 5 Md. 337, 350; Foote *v.* State, 59 Ib. 264.

[2] Art. 21.

[3] Art. 22.

[4] Art. 23. The words "by the judgment of his peers" mean a trial by jury, and the words "by the law of the land," which are copied from Magna Charta, are understood to mean due process of law, according to the course and usage of the common law. Wright *v.* Wright's Lessee, 2 Md. 429, 452.

[5] Art. 25.

[6] 54 Md. 572.

ring jurisdiction upon justices of the peace to try, convict and commit to the House of Correction vagrant and habitually disorderly persons. The act was held to be constitutional.

"The meaning of the provisions of the Declaration of Rights," said the Court, "would seem to be plain. When it is declared, that the party accused has the right to be informed of the charge against him and to have a copy of the indictment or charge, if required, to prepare for his defense, that simply means, that no prosecution can be conducted in secret, but that all prosecutions shall be open and public, upon specific charges set forth by way of indictment, or in such other form as the nature of the prosecution may require, and that the party shall not be denied full opportunity to make his defense. And, when it is declared, that the party is entitled to a speedy trial by an impartial jury, that must be understood as referring to such crimes and accusations as have, by the regular course of the law and the established modes of procedure, as theretofore practised, been the subject of jury trial. It could never have been intended to embrace every species of accusation involving either criminal or penal consequences. If that were the construction, then all cases of contempts, instead of being the subject of a summary jurisdiction, as they have always been treated, could only be tried by jury."

"The design, manifestly, of the provisions of the Declaration of Rights to which we have referred was simply to declare and make firm the pre-existing rights of the people, as those rights had been established by usage and the settled course of law. If all cases of a penal or criminal nature, where conviction may involve as a consequence, either directly or alternatively, the imprisonment of the party, must be tried upon indictment and by jury, how is the police power in the hands of the various municipal corporations to be enforced? If the State has no power to provide by law for the summary trial and conviction of vagrant and disorderly persons by justices of the peace, it would clearly follow, that no such power could be granted to be exercised under charters or ordinances of municipal corporations, and the consequence would be, that, for the violation of all mere police ordinances prescribing penalties for

their infraction, it would be the right of the party accused to insist upon indictment and trial by jury. Such a mode of proceeding, if it were practicable, has never been contended for, nor could such a contention be maintained for a moment."

§ 28.—"Confronted with Witnesses."—In declaring that the party accused shall have the right to be confronted with the witnesses against him, that provision of the Declaration of Rights is not to be understood as excluding all other evidence except oral evidence of the witnesses produced in court. Such has never been its interpretation, nor does the language warrant it. It is only where the prosecution is to be maintained by the testimony of living witnesses that they are required to be produced in court, confronted with the accused and to deliver their testimony under the sanction of an oath, and be subject to cross-examination. In other words, no witness shall give his testimony in secret, or out of the presence of the accused; and no party shall be put upon his trial upon mere hearsay evidence, but the witness shall be produced and be subject to all the tests that the law has devised for the full disclosure of the truth. In all this, however, there is nothing to exclude other evidence recognized and sanctioned by the law as fit and appropriate means of establishing the truth of the charge against the accused. Nor can there be any question of the power of the Legislature to change the common-law rules of evidence or to prescribe new rules, altogether different from those known to the common law; and it may declare what proof shall be deemed or taken as *prima facie* sufficient to establish any particular fact, even in criminal cases.[1]

§ 29.—Compelling Accused to Give Evidence.—Upon an indictment against a corporation for a violation of the license laws relating to the sale of intoxicating liquors, it was held, that a member, being liable to indictment for any participation in the violation of the statute, is entitled, when called as a witness, to insist upon his privilege of being exempt from making any disclosure that

[1] Johns *v.* State, 55 Md. 350. Cf. People *v.* Jones, 24 Mich. 214, 225; Tucker *v.* People, 122 Ill. 583.

might be used for his crimination.[1] "This," said the Court of Appeals, "is a personal privilege of the witness and must be claimed by him upon oath, and, consequently, neither the party to the cause nor the counsel engaged will be permitted to make the objection.[2] The mere statement of the witness on oath, that he *believes* that the answer to the question asked will tend to criminate him, will not suffice to protect him from answering, if, from all the circumstances surrounding the case, the court is satisfied that the answer will have no such effect as that claimed by the witness. It is for the court to decide, whether the privilege is well and *bona fide* claimed or not, and, therefore, it must be able to see, from the surrounding circumstances and the nature of the evidence sought to be elicited by the answer, whether reasonable ground exists for apprehending danger to the witness from his being compelled to answer.[3] Formerly it was thought, that, if a witness chose to reply in part, he might be compelled to answer everything relating to the transaction. But that doctrine has been solemnly overruled, and it is now finally settled in the English courts, that, after a witness has been sworn, he may claim his protection at any stage of the inquiry, and upon his so doing, he cannot be compelled to answer any additional question that would tend to criminate him. Therefore, notwithstanding the witness had testified without objection that he had gotten whiskey and beer at the club-rooms [of the appellant], he was entitled, upon further examination, to insist upon his privilege as to any additional fact that it was sought to have disclosed by him whereby he might criminate himself."[4]

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[1] Chesapeake Club *v.* State, 63 Md. 446.

[2] 1 Greenl. Ev. § 451; 2 Tayl. Ev. 1319; 2 Phill. Ev. 9 ed. 418; Reg. *v.* Kinglake, 11 Cox C. C. 499.

[3] 2 Tayl. Ev. § 1311; 2 Phill. Ev. 9 ed. 417, 418; Reg. *v.* Boyes, 1 Best & Sm. 311; S. C., 9 Cox C. C. 32; S. C., 2 F. & F. 157.

[4] 1 Greenl. Ev. § 451; 2 Tayl. Ev. 1319; 1 Wharton Cr. L. 7 ed. §§ 805, 806; Reg. *v.* Garbett, 1 Den. C. C., 236; S. C., 2 C. & K. 474.

The Constitution formerly confided to the Legislature the power to compel a party to give evidence against himself (§ 20, Dec. of Rights, in Const. 1776 and Const. 1851); but this power was very strictly interpreted. Broadbent *v.* State, 7 Md. 416; Day *v.* State, 7 G. 321.

§ 30.—**Change of Venue.**—The power to remove causes from one county to another was an acknowledged part of the ordinary jurisdiction of the Court of King's Bench in England, but in this State it has been regulated by legislative and constitutional provisions.[1] After it became a constitutional right, it was held that the Legislature, by ordinary legislation, could not restrict but might enlarge it. Yet it has always been subject to be modified by constitutional amendment.[2]

A right conferred in regard to the removal of causes does not fall within the class of vested rights. It is but a remedy, given to secure an impartial trial, which, at any time, may be altered or modified by the proper authority.[3]

§ 31. **Imprisonment for Debt.**—The Constitution of this State contains this provision:

No person shall be imprisoned for debt.[4]

A fine imposed by a justice of peace for a misdemeanor is held not to be a debt within the meaning of the constitutional term, for the reason that the evident intention of the Constitution was to relieve those who could not pay their debts, not to shield from punishment those persons who had violated the criminal law—to provide a protection for the unfortunate, not an immunity for the criminal.[5] There is a broad distinction between imprisonment for debt, within the meaning of the Constitution, and imprisonment for a breach of duty on the part of a public officer, although such breach may be the neglect or refusal on his part to pay over money received by him for the use of the State, as in the case of a tax collector. It is no objection to a statute that it provides that, upon the payment of the money for which he is in default, either before or after conviction, such collector shall be discharged from prosecution, for the reason that the Legislature has the right to prescribe the terms and conditions upon which punish-

[1] Const. art. 4, sec. 8 amended by Act 1874 ch. 364; Price *v.* State, 8 G. 295.

[2] Smith *v.* State, 44 Md. 530.

[3] Dulany *v.* State, 45 Md. 99.

[4] Art. 3, sec. 38.

[5] State *v.* Mace, 5 Md. 337.

ment shall be imposed.[1] A statute,[2] however, which authorized the commitment of the sureties in cases where bail had been forfeited was held to be unconstitutional, upon the ground that a recognizance is, in language and substance, a debt.[3] Whether a statute imposing imprisonment for non-payment of the *costs* in a criminal case is in conflict with this provision, has not been settled in this State. In some states, under constitutional provisions similar to our own, such legislation has been upheld,[4] while, on the other hand, there is authority for the opposite doctrine.[5]

§ 32.—**Jury Judges of Law.**—The provision in the State Constitution upon this subject reads as follows:

> In the trial of all criminal cases the jury shall be the judges of law as well as of fact.[6]

This provision has been held to be merely declaratory: it has not altered the pre-existing law regulating the powers of the court and jury in criminal cases.[7] The jury in a criminal case, where a demurrer to an indictment has been overruled, thus sustaining the constitutionality of a statute upon which the indictment was founded, were held not to be the proper judges of the constitutionality of the act, and the Court properly prevented the counsel for the traverser from arguing the question before them.[8] So, likewise, the question as to whether an act of assembly becomes operative or not, must be determined, as a preliminary question, by the court, and cannot afterwards be mooted before the jury.[9] But, in regard to the question of the legal sufficiency of the evidence, the jury are the sole judges; any instruction given by the court as to the *law of the crime* is but advisory and in no manner binding

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[1] State *v.* Nicholson, 67 Md. 1

[2] Act 1854, ch. 114.

[3] Bly's Case, Cir. Ct. Baltimore Co., Oct. 1868.

[4] Morgan *v.* State, 47 Ala. 34; Caldwell *v.* State, 55 Ib. 133; Dixon *v.* State, 2 Tex. 481.

[5] Thompson *v.* State, 16 Ind. 516.

[6] Art. 15, sec. 5.

[7] Franklin *v.* State, 12 Md. 236; Bell *v.* State, 57 Ib. 108, 118-121.

[8] Franklin *v.* State, *supra*.

[9] Slymer *v.* State, 62 Md. 237, 241.

upon the jury, except in regard to questions as what shall be considered as evidence.[1] Whenever a *prima facie* case of guilt is made out, it is the duty of the court to leave it to the jury to say, whether the evidence is sufficient in law and in fact to prove the offense.[2] The court may, however, in its discretion, advise the jury as to the law and legal effect of the evidence.[3]

The case of *Bell v. State*[4] arose upon an indictment for forging and uttering an order for the payment of money, a bank check. The State, in order to prove the *scienter*, was allowed to prove that, about the time of the forgery alleged in the indictment, the appellant had forged and uttered another check, of the forging and uttering of which, however, he had been acquitted, the record of acquittal being produced by the defense. In arguing the case before the jury, the counsel of the appellant contended that the record of acquittal was *conclusive* of the case then on trial. The Court interposed and refused to permit such argument, upon the ground that they had expressly decided that it was competent for the State on this trial to prove that said second check was a forgery and was passed and uttered by the prisoner and that said record of acquittal was not admitted in evidence nor allowed to go the jury for the purpose of having any such conclusive effect, but only for the purpose of affecting the weight or credibility of the evidence against the prisoner. Upon appeal, this position was sustained, for reasons which will be given in the language of the Appellate Court:

"The court has an undoubted right to state to the jury the legal effect of evidence which has been introduced and submitted to their consideration.[5] Not having excepted to the statement made by the Court of the legal effect of the record, it became the law of the case.[6] Being the law of the case, counsel were not at liberty to argue against

[1] Wheeler *v.* State, 42 Md. 563; Broll *v.* State, 45 Ib. 356.

[2] Bloomer *v.* State, 48 Md. 521, 537-540.

[3] Broll *v.* State, *supra;* Forwood *v.* State, 49 Md. 531.

[4] *Supra.*

[5] McHenry *v.* Marr, 39 Md. 510, 532, 533; Wheeler *v.* State, *supra.*

[6] Hagan *v.* Hendry, 18 Md. 177; Davis *v.* Patton, 19 Ib. 120, 128; Dent *v.* Hancock, 5 G. 120, 127.

it.[1] It is true, that article 15, section 5 of the Constitution declares, that, 'in the trial of all criminal cases the jury shall be the judges of law as well of fact;' but this Court has said, 'that the words in the Constitution have no greater significance since their incorporation into the organic law than they had previously.'[2] This Court has also decided, that the court has a right to instruct the jury in a criminal case as to the legal effect of evidence,[3] and, having such right, it follows, of course, that it also has the right to prevent counsel from arguing against such an instruction. If a jury should disregard an instruction in a criminal case and convict, the evil can be remedied by granting a new trial. But if they should acquit in disregard of it, there seems to be no remedy."

§ 33.—"Cruel or Unusual Punishment."—This subject was discussed in the case of *Foote v. State*,[4] in which the constitutionality of the statute[5] imposing the punishment of whipping for wife-beating was maintained. The reasoning of the Court is as follows:

"The terms 'cruel and unusual pains and penalties' and 'cruel or unusual punishment' have been incorporated into each successive Constitution of this State from 1776 to the present time. That the punishment of whipping was not considered a 'cruel or unusual punishment' and, therefore, coming within the prohibition of the Constitution, is most conclusively shown by the fact that the punishment by whipping was recognized by the statute law of the State under all these Constitutions, certainly down to the Constitution of 1864, and then only obliterated from the statute book, not by direct repeal, but by force of the constitutional amendment abolishing slavery."

"It is true, that, under some of the later Constitutions, the punishment by the laws was confined to negroes and slaves, but the words 'cruel or unusual' covered *all* cases of punishment and were as applicable to slaves as to whites.

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[1] Sowerwein *v.* Jones, 7 G. & J. 335, 341.

[2] Franklin *v.* State, *supra*.

[3] Wheeler *v.* State, *supra*.

[4] 59 Md. 264. Cf. Garcia *v.* Territory, 1 N. Mex. 415.

[5] Act 1882, ch. 127; Code, art. 27, secs. 14, 15.

At the time of the adoption of the Bill of Rights in 1776, and for a long time before and for a long time thereafter, the punishment of whipping for certain offenses was imposed upon whites and blacks alike. We are not dealing with the expediency, justice or efficacy of this punishment, but only with the true interpretation of the terms of the Constitution under which we live. When, therefore, we find that the people who made this Constitution, and who must be presumed to understand the meaning of the terms they use, have, from the time these words were first incorporated in 1776 down to 1882, a period of more than a hundred years, through several successive legislatures, uniformly held that the punishment of whipping was not included in that class which the Constitution forbids, we should violate the plainest principles of the construction of statutes now to decide otherwise. We have not only the contemporaneous but the continued exposition of the meaning of the words in this long course of legislative construction, upheld and continually enforced by the courts in the imposition of the punishment."

§ 34.—**Internal Police.—Liquor Selling.**—The State has a right to regulate its internal police and everything that relates to the morals and health of the community. Statutes regulating the sale of liquors, or restraining, or even altogether prohibiting the traffic therein, fall within this power and do not contravene any provision of the Federal Constitution.[1] There can be no question that the Legislature has the power to prohibit the sale of liquor, notwithstanding a party to be affected by the law may have procured a license under the laws of the State which has not yet expired. Such a license is in no sense a contract made by the State with the party holding it. It is a mere permit, subject to be modified or annulled at the pleasure of the Legislature,

[1] Keller *v.* State, 11 Md. 525. Cf. Thurlow *v.* Massachusetts, 5 How. 504; McGuire *v.* Massachusetts, 3 Wall. 387; U. S. *v.* Vassar, 5 Ib. 462; Carney *v.* Iowa, Ib. 480; Hinson *v.* Lott, 8 Ib. 148; Downham *v.* Alexandria, 10 Ib. 173; Bartemeyer *v.* Iowa, 18 Ib. 129; Beer Co. *v.* Massachusetts, 97 U. S. 25; U. S. *v.* 43 Gallons of Whiskey, 108 Ib. 491; Foster *v.* Kansas, 112 Ib. 201; Mugler *v.* Kansas, 123 Ib. 623; Kidd *v.* Pearson, 128 Ib. 1.

who have the power to change or repeal the law under which the license has been granted.[1]

§ 35.—**Delegation of Powers.**—It is a well-settled principle, that the power conferred upon a legislature to enact laws cannot be delegated by that department to any other body or authority. *Delegatus non delegare potest.*[2] But a statute[3] by which the Board of Police Commissioners of Baltimore City are authorized and empowered, whenever, in their judgment, the public peace and tranquility may require it, to order the closing temporarily of all places where liquor is usually sold in the City of Baltimore, was held not to exceed the legislative authority or to violate any provision of the Constitution.[4]

§ 36.—**Same Subject—Local Option Laws.**—A statute providing that the citizens of the several election districts of certain counties shall cast ballots whether or not the sale of spirituous or fermented liquor shall be permitted in such districts, and, if it should be found by the returns of the judges of election and proclamation of the judges of the Circuit Court that the majority of the votes in a district had been cast against the sale, then it should not be lawful to sell liquors in such district, is constitutional and valid. Its going into effect and becoming operative being made to depend upon the result of a popular vote is not a delegation of legislative power to the people. What has been delegated to the voters in such a case is not the power to make the law or to repeal existing laws. They are called upon simply to express, by their ballots their opinion or sentiment as to the subject-matter to which the law relates. They declare no consequences, prescribe no penalties and exercise no legislative functions. The consequences are declared in the law and are exclusively the result of the legislative will. The act, in such cases, is "a perfect and complete law as it left the halls of legislation and was approved by the Governor," but, by its terms, it was made to go into operation in any district upon the contingency that the

[1] Parkinson *v.* State, 14 Md. 184; Fell *v.* State, 42 Ib. 71, 89.
[2] Fell *v.* State, 42 Md. 71, 84.
[3] Code P. L. L., art. 4, sec. 734.
[4] State *v.* Strauss, 49 Md. 288.

legal voters within the district be ascertained to be in favor of the prohibition contained in the act. A valid law may be passed to take effect upon the happening of a future contingent event, even where that event involves the assent to it by other parties. It is for the Legislature to judge in what contingency or upon what condition the act shall take effect; they have the power to prescribe any they may think proper. A condition that a vote of approval shall first be given by the people affected by the proposed measure is as good and valid as any other. There can be no inherent vice in the nature of such a condition that shall serve to defeat the act, when it would be legal and effectual if made to depend upon any other event.[1]

§ 37.—Tobacco Inspections—Powers of State Legislature.—Section 41 of chapter 346 of the Laws of 1864, as amended and re-enacted by chapter 291 of the laws of 1870, now repealed and re-enacted,[2] provided that it should not be lawful to carry out of this State in hogsheads any tobacco raised in this State, except in hogsheads which shall have been inspected, passed and marked agreeably to the provisions of the Act, provided that the Act should not be construed to prohibit any grower of tobacco or any purchaser thereof, who might pack the same in the county or neighborhood where grown, from exporting or carrying out of this State any such tobacco, without having the same opened for inspection; but such tobacco so exported or carried out of this State without inspection was required to be marked with the name in full of the owner and his place of residence and was liable to the same charge of outage and storage as in other cases. This legislation, it was held, was not, in its provisions as to charges for outage and storage, in violation of clause 2 of section 10 of article 1 of the Constitution of the United States as respects any impost duty imposed by it on exports, or of the clause of section 8 of article 1, which gives power to Congress "to regulate commerce with foreign nations and among the several States;" nor could it be regarded as a regulation of commerce or unconstitutional as discriminating between

[1] Fell *v.* State, 42 Md. 71; Slymer *v.* State, 62 Ib. 237. Cf. Crouse *v.* State, 57 Ib. 327; Jones *v.* State, 67 Ib. 256.

[2] Code, art. 48, sec. 48.

the state buyer and manufacturer of leaf tobacco and the purchaser who buys for the purpose of transporting the tobacco to another state or to a foreign country, or discriminating between different classes of exporters of tobacco. It was further held, that the charge for outage is an inspection duty within the meaning of the Constitution, and it is not foreign to the character of an inspection law to require every hogshead of tobacco to be brought to a state tobacco warehouse; and that dispensing with an opening for inspection of the hogsheads mentioned in the proviso did not, in view of the other provisions of the statutes of this State, deprive these statutes of the character of inspection laws.[1]

§ 38.—**Common Right of Fishery.**—It is settled that the lands of the State covered by navigable water may be granted, subject to the public right of navigation and fishery; and, independently of the question as to the power of the Legislature to restrict those rights by grants in severalty, it is clear that they may be aided by grants conferring particular privileges. The power of the Legislature to authorize the erection of wharves and the reclamation of land from the water for the purpose of navigation and commerce has never been questioned, notwithstanding the effect has been to confer privileges and advantages wholly private and exclusive in their character. And there appears to be no substantial reason why it may not, in like manner, grant privileges affording particular and exclusive benefits, for the purpose of increasing generally the product and value of the common right of fishery.

For reasons thus stated, legislation authorizing the location of oyster lots by the owners of land bordering upon navigable waters in this State and punishing the offense of taking oysters therefrom by third parties has been held to be constitutional.[2]

[1] Turner *v.* State, 55 Md. 240; S. C., *nom.* Turner *v.* Maryland, 107 U. S. 38.

No inspection was involved except that of tobacco grown in Maryland, and no opinion was expressed by the Supreme Court as to any provisions of Maryland laws that refer to inspection of tobacco grown out of Maryland.

[2] Phipps *v.* State, 22 Md. 380. See, also, Code, art. 72, secs. 39-41.

§ 39.—**Non-resident Traders.**—A former statute[1] of this State required all traders resident within the State to take out licenses and to pay therefor certain sums regulated by a sliding scale of from $12 to $150, according as their stock in trade might vary from $1,000 to more than $40,000. The Statute also made it a penal offense in any person not a permanent resident in the State to sell, offer for sale or expose for sale, within certain limits in the State, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in Maryland, within the said limits, either by card, sample or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do, for which license (to be renewed annually) a sum of $300 was to be paid. It was held by the Supreme Court of the United States,[2] that this statute imposed a discriminating tax upon non-resident traders trading in the limits mentioned, and that it was, *pro tanto*, repugnant to the Federal Constitution and void, being in conflict with article 4, section 2, which provides, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

"This clause," said the Court, "plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes and excises than are imposed by the state upon its own citizens."[3]

Under the present law of this State[4] a person not residing within the State, who wishes to carry on business within its limits is required to pay the same rate of license,

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[1] Code of 1860, art. 56, secs. 37-40.

[2] Ward *v.* Maryland, 12 Wall. 418, reversing Ward *v.* State, 31 Md. 279.

[3] See also Campbell *v.* Morris, 3 H. & McH. 535; Douglass *v.* Douglass, 1 Del. Ch. 465; Lemmon *v.* People, 20 N. Y. 562; McCready *v.* Comm., 27 Gratt. 985; Conner *v.* Elliot, 18 How. 591; Corfield *v.* Coryell, 4 Wash. C. C. 371, 380; Asher *v.* Texas, 128 U. S. 129.

[4] Code, art. 56, secs. 35-54.

regulated by the same standard, as a resident. The Legislature, in regulating the rate of license, has adopted as a standard the amount or value of the stock in trade of the dealer. This is imposed on traders as a tax upon their occupation or business of vendors, and has, therefore, been held to be valid in the case of a non-resident who sells by sample, the stock being in another state.[1]

§ 40.—**Equal Rights.—Negro Apprentices.—Bastardy Laws.**—Questions have arisen as to the validity of statutes in relation to "negro apprentices"[2] and illegitimate children,[3] the provisions of the Code, of 1860 in relation to the latter having had application exclusively to white women. Both laws were held to be constitutional. Under the present Code distinctions in regard to "negro apprentices" or "white women" in the apprentice[4] and bastardy[5] laws do not exist.

§ 41.—**Ex Post Facto Laws.**—Every *ex post facto* law must be retrospective, but every retrospective law is not an *ex post facto* law. *Ex post facto* laws relate to penal and criminal proceedings, which impose punishment or forfeitures, and not to civil proceedings which affect private rights retrospectively.[6] An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed. Any law passed after the commission of an offense, which, in relation to that offense or its consequences, alters the situation of a party to his disadvantage is an *ex post facto* law.[7]

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[1] Corson *v.* State, 57 Md. 251.

[2] Brown *v.* State, 23 Md. 503.

[3] Plunkard *v.* State, 67 Md. 364.

[4] Art. 6.

[5] Art. 12.

[6] Watson *v.* Mercer, 8 Pet. 88; Calder *v.* Bull, 3 Dall. 386; Baltimore & S. R. R. *v.* Nesbitt, 10 How. 395; Carpenter *v.* Pennsylvania, 17 Ib. 456; Locke *v.* New Orleans, 4 Wall. 172.

[7] Anderson *v.* Baker, 23 Md. 531, 582; Fletcher *v.* Peck, 6 Cranch, 87, 138; Cummings *v.* Missouri, 4 Wall. 277; Gut *v.* Minnesota, 9 Ib. 35; Pierce *v.* Carskadon, 16 Ib. 234; U. S. *v.* Fox, 95 U. S. 670; Burgess *v.* Salmon, 97 Ib. 381; Hopt *v.* Utah, 110 Ib. 574; Kring *v.* Missouri, 107 Ib. 221. Jaehne *v.* New York, 128 Ib. 189.

CHAPTER IV.

Statutory Construction.

§ 42.—**Statutes Relating to Crime and Criminal Procedure.**—A very considerable proportion of the body of our criminal jurisprudence is composed of statute law. This law either creates new offenses, unknown to the common law, or enlarges the definition of common-law offenses, or defines their penalty merely, or relates to matters of trial and procedure. In every aspect, the statutory portion of our criminal law forms an important feature, and questions of statutory interpretation and construction are among the most frequent and interesting ones that demand the attention of the practitioner.

§ 43.—**General Rules of Construction.**—The cardinal purpose of all interpretation, to which all rules and canons must yield, is to ascertain the true legislative intent, and, where the legislative meaning is plain, the courts have simply to enforce a statute according to its obvious terms. Where clear words are used to indicate the purpose of the lawgiver, there is no necessity to resort to other aids. It is only in cases where the meaning of a statute is doubtful, that the courts are authorized to indulge in conjecture as to the intention of the Legislature or to look to consequences in the construction of the law.[1]

Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction for the purpose of either limiting or extending their operation. No man incurs a penalty, unless the act which subjects him to it is clearly both within the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction. The law does not allow of constructive offenses or arbitrary punishment.[2]

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[1] Cearfoss *v.* State, 42 Md. 403.

[2] Ib.

Penal statutes are not to be extended by construction, yet should receive a rational interpretation. They are to be construed strictly, yet the courts are bound to give effect to their plain and obvious meaning, and not narrow the construction. They must search out and follow the true intent of the lawgiver.[1]

All the parts of a statute and all acts, though made at different times, or even expired or repealed, and the entire system of laws and the common law touching the same matter must be taken together, and, if one part standing by itself is obscure, it may be aided by another which is clear.[2]

§ 44.—General Terms Following Specific Terms.—Where particular words in a statute are followed by general, —as if, after the enumeration of classes of persons or things, it is added, "and *all others*,"—the general words are restricted in meaning to objects of the like kind with those specified, and, similarly, a statute which treats of things or persons of an inferior rank cannot by any general words be extended to those of a superior. Yet, where the courts can see that the application of this rule would lead to results contrary to the real intention of the legislator, they will not give it effect.[3]

§ 45.—Legislative Grants of Authority.—Municipal Ordinances and By-Laws.—It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public.[4]

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[1] House *v.* House, 5 H. & J. 125; Keller *v.* State, 11 Md. 525; Parkinson *v.* State, 14 Ib. 184; World *v.* State, 50 Ib. 49; Stewart *v.* State, 62 Ib. 412.

[2] Bishop Stat. Cr., 2 ed., § 82; Keller *v.* State, *supra*; State *v.* Popp, 45 Md. 432.

[3] Bishop Stat. Cr., 2 ed., §§ 245–246 b; Stewart *v.* State, *supra*.

[4] Minturn *v.* Larue, 23 How. 435.

The Board of Police Commissioners of Baltimore City are authorized,[1] whenever, in their judgment, the public place and tranquility shall require it, to order all bar-rooms and drinking saloons to be closed temporarily, and it is made a misdemeanor to disobey such order "during such period as the said Board shall so forbid." This statute is construed to mean, that these orders shall operate not only for a *short*, but for a *definite* interval or portion of time, to be *specified on their face*, and that an order which, by its terms, is to operate "until further notice" is unauthorized and void.[2]

Under its charter[3] the corporation of the Mayor and City Council of Baltimore has power "to pass ordinances to preserve the health of the City, *to prevent and remove nuisances*, and to prevent the introduction of contagious diseases within the City and within three miles of the same, and may regulate the places for manufacturing soap and candles and the erecting of slaughter-houses and distilleries and where every other offensive trade is carried on." An ordinance was passed, under the supposed sanction of the authority thus conferred, forbidding the erection or operation within the corporate limits of any kiln for the purpose of burning oyster shells or stone lime, but was held void because the power conferred by the statute could not be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which, in its nature, situation or use, was not or might not be such. The burning of lime is not a nuisance *per se*, irrespective of local surroundings, and the corporation can not make lime-kilns nuisances by simply declaring them so.[4]

§ 46.—**Repeal of Statutes.**—Repeals of statutes are either express or by implication. The law does not favor repeals by implication, and the intention to repeal must be plainly deducible from the language of the Legislature or follow from the provision of the later statute as an inevit-

[1] Code P. L. L., art. 4, sec. 734.
[2] State *v.* Strauss, 49 Md. 288.
[3] Code P. L. L., art. 4, sec. 378.
[4] State *v.* Mott, 61 Md. 297.

able consequence.[1] No statute, except by express words or affirmative implication, operates as a repeal of the prior law, whether statutory or common.[2] The conflict should be irreconcilable.[3]

Where there are two acts on the same subject, the rule is, to give effect to both, if possible. But, if the two are repugnant in any of their provisions, the latter act, without any express repealing clause, operates, to the extent of such repugnancy, as a repeal, or an abrogation, of the former.[4]

Where the Legislature makes a revision of particular statutes and passes a general statute upon the subject, and it is evident, from the general framework of the statute and the manner in which the subject-matter is dealt with, that the Legislature intended such general statute to be a complete system of legislation in regard to the matter, the statute thus passed must be considered as a substitute for all prior laws on the subject, and the provisions of such prior laws as are not embraced by the latter statute are thereby repealed.[5]

Where different provisions of the same act conflict, and there is a plain inconsistency and repugnancy among them, so that the legislative intent can not be ascertained, all must be held invalid.[6]

In cases of irreconcilable conflict between provisions of the local laws and general laws enacted at the same time, by their simultaneous adoption as part of the Code of Public Laws, the local law prevails.[7]

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[1] Bishop Stat. Cr., 2 ed., § 155.

[2] Ib., § 157.

[3] Ib., § 160; State *v.* N. C. R. R., 44 Md. 131, 167; Willing *v.* Bozman, 52 Ib. 44, 61; Mayor *v.* Magruder, 34 Ib. 381; Snowden *v.* State, 69 Ib.

[4] Bishop Stat. Cr., 2 ed., § 165; Davis *v.* State, 7 Md. 151; State *v.* Yewell, 63 Ib. 120.

[5] Turner *v.* State, 55 Md. 240, 260; U. S. *v.* Tynen, 11 Wall. 88, 92.

[6] Pierce *v.* State, 63 Md. 592.

[7] Code, art. 1, sec. 11; Alexander *v.* Mayor, 53 Md. 100, 104.

CHAPTER V.

Preliminary Proceedings.

§ 47.—**The Arrest—Conservators of the Peace.**—The duty and power to make arrest, while not, as will be seen in the next following section, absolutely confined to official persons, are ordinarily vested in certain officials of various grades and designations, collectively known as *peace officers*, or *conservators of the peace*.[1] The officers ordinarily charged with the arrest of offenders in this State are sheriffs, constables, policemen and town bailiffs. The duty and authority of conservators of the peace vest in all sheriffs and constables at common law and are expressly declared in the State Constitution.[2] There is also to be found in the Code of Public General Laws a special enumeration of certain police duties of constables.[3] Policemen and town bailiffs possess such of the police powers of constables as are vested in them by various local statutes. For the City of Baltimore a police force, under the government of the Board of Police Commissioners for Baltimore City, is provided, clothed with extensive powers.[4] Provision is also made for the appointment by the Governor of policemen for the protection of the property of corporations owning or using any railroad, steamboat, canal, furnace, colliery or rolling mill in this State and for the preservation of peace and good order on their respective premises, railroad trains or steamboats;[5] and agents, officers and representatives of incorporated institutions, societies or bodies for the care, custody or protection of children or minors having in their custody,

[1] Stephen Hist. Crim. L. 185.

[2] Art. 4, secs. 42, 44.

[3] Art. 20, secs. 25-30.

[4] Code P. L. L., art. 4, secs. 728-756; Mitchell *v.* Lemon, 34 Md. 176; Roddy *v.* Finnegan, 43 Ib. 490.

[5] Code, art. 23, secs. 288-293.

care or personal charge any minor, or person under twenty-one years of age, are by statute vested with all the privileges and authority of conservators of the peace, and persons interfering with or obstructing them are guilty of a misdemeanor.[1] Conductors of railroad trains may arrest thieves and pickpockets.[2]

§ 48.—**Causes and Manner of the Arrest.**—All persons who are present when a felony is committed, or a dangerous wound given, which, if the wounded person dies, will amount to felony, are authorized, and even obliged, to arrest the offender.[3] It is the duty of private persons as well as officers to suppress, by force, if necessary, riots, affrays and breaches of the peace. Any one may lawfully lay hold of any other person whom he shall see on the point of committing a treason or felony, or doing an act that will manifestly endanger the life or person of another, and may detain him until it may reasonably be presumed that he has changed his purpose. Thus, any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance.[4] Where a felony has been actually committed, a private person, acting in good faith and upon reasonable and probable ground of suspicion is justified in apprehending, without a warrant, the suspected person, in order to carry him before a magistrate.[5]

An officer is authorized and in duty bound to arrest any one without a warrant who commits an offense, of whatever grade, in his presence,[6] and he may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not, and whether acting on his own knowledge or facts communicated by others; but, if the offense does not amount to felony, he is not justified in making the arrest without a warrant, when such offense has not been committed in his presence, or view. When, however, a warrant has been

[1] Code, art. 27, sec. 208.
[2] Code, art. 27, sec. 256.
[3] 1 Bish. Cr. Proc. § 165.
[4] Handcock *v.* Baker, 2 Bos. & P. 260.
[5] Ledwith *v.* Catchpole, Cald. 291; Mure *v.* Kaye, 4 Taunt. 35.
[6] Mitchell *v.* Lemon, 34 Md. 176; Roddy *v.* Finnegan, 43 Ib. 490.

regularly issued, an officer to whom it is directed or confided is free from all liability in making the arrest, even though the prosecution be a malicious one; but it is otherwise when the warrant is glaringly and palpably defective.[1] A warrant may be directed to a private person, but he is not compellable to execute it.[2] Private persons must assist an officer in making an arrest when called upon.[3]

§ 49. — Pursuit of Offenders. — Breaking Doors. — Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender, without a warrant; but in cases of misdemeanors and breach of the peace a warrant is required. It is likewise said, that mere suspicion of felony will not justify him in proceeding to this extremity, unless he be armed with a warrant.[4]

If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a peace officer, having notice of it and demanding entrance and being refused, and the affray continuing, may break open the doors to keep the peace.[5]

If the officer has once entered by the outer door, being open, he may break open the inner doors.[6] But he should first demand admittance, making known his purpose.[7] Yet when, as in cases of fresh pursuit, the inmates are aware of his object, demand is not necessary.[8] A private person

[1] Lewin *v.* Uzuber, 65 Md. 341.

[2] 1 Hale, 581.

[3] State *v.* Mayhew, 2 G. 487, 501; McMahan *v.* Green, 34 Vt. 69; Coleman *v.* State, 63 Ala. 93; Coyles *v.* Hurtin, 10 Johns. 85; Comfort *v.* Comm., 5 Whart. 437; State *v.* Shaw, 3 Ired. 20; State *v.* Hailey, 2 Strobh. S. C. 73; State *v.* Deniston, 6 Blackf. 277; Mitchell *v.* State, 12 Ark. 50; S. C., 54 Am. Dec. 253.

[4] Fost. 320, 321; Hawk. P. C. b. 2, c. 14, s. 7. *Contra*, 1 Bish. Cr. Proc. § 196, n. 6.

[5] 2 Hale, 95; Hawk. P. C. b. 2, c. 14, s. 5; 1 Chitty Cr. L. 52, 3; 1 Bish. Cr. Proc. § 197.

[6] 1 Hale, 458.

[7] Lannock *v.* Brown, 2 B. & Ald. 592; Ratcliffe *v.* Burton, 3 B. & P. 223.

[8] Allen *v.* Martin, 10 Wend. 300; S. C., 25 Am. Dec. 564.

in fresh pursuit may force an entrance to a house under circumstances which authorize him to make an arrest.[1]

An escape by a prisoner lawfully arrested warrants the retaking of him on fresh pursuit and the breaking of doors for that purpose.[2]

§ 50.—**Hue and Cry.**—Hue and cry is the old common-law process of pursuing felons and such as have dangerously wounded others from town to town until taken. The hue and cry may be raised by constables, private persons or both. The constable and his assistants have the same powers, protection and indemnification as if acting under a warrant from a magistrate. Private persons who join are justified, even though it should transpire that no felony has been committed. To raise the hue and cry without cause is a misdemeanor. British statutes in relation to this process are still regarded as being in force in this State.[3]

§ 51.—**Time of Arrest.**—The arrest may be made at any time, at night as well as during daytime, at whatever hour the officer having the warrant deems expedient,[4] but no warrant may be executed or served on Sunday, except in cases of treason, felony or breach of the peace.[5]

§ 52.—**Exemptions from Arrest.**—The Senators and Representatives of the United States are in all cases, except treason, felony and breach of the peace, privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same.[6]

Foreign ambassadors, ministers and representatives are independent of the ordinary criminal jurisdiction of the country to which sent and not liable to arrest or other

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[1] 4 Bla. Comm. 293.

[2] 1 Chitty Cr. L. 61; Comm. *v.* McGahey, 11 Gray, 194; Cahill *v.* People, 106 Ill. 621.

[3] 13 E. 1, stat. 2, ch. 4; 7 R. 2, ch. 6; Alexander Br. Stat. 154, 190. See also 1 Hale, 489, 490; 1 Hawk. P. C. ch. 28, s. 11; Fost. 309; 1 East P. C. ch. 5, s. 67.

[4] 1 Bishop Cr. Proc. § 207.

[5] 29 Car. 2, ch. 7; Alexander Br. Stat. 562.

[6] Const. U. S., art. 1, sec. 6; 1 Story Const. § 865.

criminal process. If guilty of grave crimes, they must be remanded home to their sovereign for judgment.[1]

Jurymen and witnesses, during their attendance at court, are privileged from an arrest: but it is the privilege of the court and not of the party.[2]

§ 53.—**The Preliminary Hearing.**—When an offender has been arrested, he should promptly be carried before the proper officer for examination upon the charge. The power to issue warrants and to conduct the examination of offenders is vested in all judges of superior courts, who, by virtue of their offices, are conservators of the peace throughout the State,[3] and justices of the peace,[4] the latter being the officials before whom the preliminary examination is ordinarily had in this State. The Mayor of Baltimore, in virtue of his office, has all the jurisdiction and powers of a justice of the peace, except as to the recovery of debts,[5] and similar powers are conferred upon mayors, town burgesses and the like officials by various local laws in other portions of the State.

While arrests may and should be made without a warrant in cases of breach of the peace, offenses committed within view of the officer and where there is danger of the escape of a felon, yet, unless under exceptional circumstances of this kind, an arrest should be upon complaint, or information, under oath and warrant issued thereupon.[6] And magistrates are not bound to issue a warrant, even though there be a positive charge on oath: but it is their duty well to consider all the circumstances sworn to and not to grant any warrant groundlessly or maliciously, without such a probable cause as might induce a discreet and

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[1] Woolsey Int. L. §§ 92 e, 96; U. S. *v.* Benner, 1 Baldw. 234; Rev. Stats. U. S. §§ 4062-4065.

[2] Brookes *v.* Chesley, 4 H. & McH. 295.

[3] Const. art. 4, sec. 6; Exp. O'Neill, 8 Md. 227; In re Glenn, 54 Ib. 572; Parrish *v.* State, 14 Ib. 238, 246.

[4] Const. art. 4, sec. 42.

[5] Code P. L. L. art. 4, sec. 11.

[6] 1 Chitty Cr. L. 33. But see, as to arrests of thieves and pickpockets, Code, art. 27, secs. 255, 256; as to arrests, in Baltimore City, of paupers, habitual beggars, vagrants, vagabonds or disorderly persons, Code P. L. L., art. 4, sec. 880.

impartial man to suspect the party to be guilty.[1] The following provision of the Declaration of Rights should be noted in this connection:

> That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place or the person in special, are illegal and ought not to be granted.[2]

In the City of Baltimore certain justices of the peace are especially designated to sit at the station houses, to hear all charges made against any person for any criminal offense, and all criminal writs issued by any justice of the peace must be made returnable before one of the justices so designated to sit at station houses, and it is the duty of all police officers and constables making arrests for crime to take the person arrested to the nearest station house, and the justice of the peace sitting at such station house shall take jurisdiction of the case.[3]

It is the duty of the officer to bring the party accused, within a reasonable time after the arrest, before the proper magistrate, in order that he may be examined, and, after due investigation, discharged, bailed or committed. It then becomes the duty of the magistrate to take and complete the examination of all concerned, and to discharge or commit the individual suspected as soon as the nature of the case will permit; but he is allowed a reasonable time for this purpose before he makes his final decision.[4]

§ 54.—**Discharge of Prisoner.**—If, upon the examination of the prisoner, it appears that no crime was committed or that the suspicion entertained against the prisoner was groundless, he should be discharged. Unless a *prima facie* case is made out against the prisoner, by witnesses entitled to a reasonable degree of credit, the magistrate should not commit or hold him to bail.

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[1] 1 Chitty Cr. L. 31.

[2] Art. 26. See also Const. U. S., Amendment 4; Story Const. § 1902.

[3] Code P. L. L. art. 4, secs. 614-629.

[4] 1 Chitty Cr. L. 72, 73.

§ 55.—Bail.—The magistrate, having heard the examinations and ascertained that the party accused is not entitled to be completely discharged, is next to determine whether he shall bail or commit him. But, it should be remembered, that the prisoner may always waive the preliminary examination and at once be committed or bailed.

Bail is the delivery or bailment of a person to his sureties, upon their giving, generally together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to prison.[1] The sureties are his keepers and may reseize to bring him in, if they fear his escape, and take him before the court or magistrate by whom he may be committed, and thus the bail be discharged: but he is at liberty to find new sureties.[2]

The manner of taking bail in this State is by recognizance, entered into before the court or magistrate, conditioned that the accused shall appear at the place of trial to answer the charge against him; and, when forfeiture is declared and entered by the court, it becomes a judgment enforcible by execution.[3] When the accused is present, it is proper that he join in the recognizance; but, when the accused is an infant, a married woman, or sick in jail, the recognizance is taken from the surety alone.[4] A recognizance to appear before a court, having no existence and designating no fixed day is absolutely void;[5] but mere informalities or irregularities in the recognizance can not be availed of upon motion to quash the execution.[6]

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[1] 1 Bla. Comm. 297.

[2] 2 Hale, 124: Code P. L. L. art. 4, sec. 200.

[3] Schultze *v.* State, 43 Md. 295.

[4] Ib.

[5] Coleman *v.* State, 10 Md. 168.

[6] Shultze *v.* State, *supra:* Parrish *v.* State, 14 Md. 238.

As to procedure where recognizance is forfeited, see Code, art. 75, secs. 18, 19.

If a party is brought before a court on *habeas corpus*, and it appears that the offense was committed in another county, he may be recognized to appear before the court having jurisdiction of the offense. Parrish *v.* State, *supra.*

Where a judgment rendered in favor of the traverser upon demurrer to the indictment is reversed on writ of error, and the case

In criminal cases the prisoner may of right give bail for his appearance to answer the charge or indictment, except in capital offenses where the proof is evident or the presumption great. In these cases bail should be refused where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as is exhibited on the hearing for bail. If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed, that the accused is the guilty agent, and that he would probably be punished capitally, if the law be administered, bail is not a matter of right.[1]

A justice of the peace, or committing magistrate, may not in all cases bail where judges of superior courts may and should admit the accused party to bail. Statutes 3 E. 1, ch. 14,[2] 1 R. 3, ch. 3,[3] 3 H. 7, ch. 3,[4] 1 & 2 P. & M., ch. 13,[5] and 2 & 3 P. & M., ch. 10,[6] relating to examinations before magistrates and bail, are in force in Maryland, and are commonly cited as containing the regulation to be observed in such matters. But a number of their provisions are clearly inapplicable under the mode of criminal procedure established in this State and are not now, if ever they were, followed in practice. According to these statutes the list of cases in which magistrates may not admit to bail would seem to be considerable. The doctrine upon this subject, as founded in the established practice in this State, may be stated as follows: Justices of the peace cannot bail in cases of treason, murder and other capital offenses; neither can they bail in cases of manslaughter, but in cases of killing by mere misadventure or in clear

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remanded, the recognizance can not be forfeited if the party fails to reappear. State *v.* Murphy, 10 G. & J. 365.

Enlistment of the principal in the army of the United States does not discharge the recognizance. State *v.* Reany, 13 Md. 230, 236.

[1] 2 Encyclop. Law, 6-9.

[2] Alexander Br. St. 55.

[3] Ib. 250.

[4] Ib. 253.

[5] Ib. 369.

[6] Ib. 374.

self-defense, a justice may bail,[1] yet the responsibility is not, in practice, assumed by justices. The same remark will apply to the case of persons arrested upon light suspicion of homicide. Where a dangerous wound has been given, justices may bail, but are advised to observe great caution.[2] In other cases justices should bail as a matter of right, fixing the penalty with regard to the gravity of the charge and the weight of suspicion attaching to the accused, and having regard to the provision of the Constitution, "that excessive bail ought not to be required."[3] If the justice concludes not to admit to bail, or if the accused is unable to furnish the required security, the party must be committed for the action of the proper court.[4]

§ 56.—**Statutory Provisions in Relation to Bail.**—Bail may be taken by a court or judge upon *habeas corpus*, the recognizances to be transmitted to the court having jurisdiction over the offense.[5]

The sheriff or his deputy, when he arrests a person on a writ for any criminal offense not punishable by confinement in the Penitentiary, may take a bail-bond from the person so arrested, with security to be by him approved and in a penalty not exceeding three hundred dollars, except in those cases where a specific fine or penalty is prescribed for the commission of the offense, in which cases the penalty of the bond shall be the highest penalty or fine fixed by the law, with condition that the person so arrested shall appear in court on the day the said writ is returnable, and attend the court from day to day, and not depart therefrom without the leave of the said court; and, if the person so arrested cannot give bail-bond, he shall be taken before a justice of the peace, to be dealt with according to law. Such bail-bond shall be taken in the name of the State, and shall be returned to the court to which such writ is returnable, on the first day thereof.[6]

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[1] 1 Chitty Cr. L. 95.

[2] Hawk. P. C. b. 1, ch. 63, sec. 19.

[3] Dec. of R. art. 25.

[4] The commitment should be under seal. Somervell *v.* Hunt, 3 H. & McH. 113.

[5] Code, art. 42, sec. 11; Parrish *v.* State, 14 Md. 238.

[6] Code, art. 87, secs. 7, 8.

Each of the circuit judges for the counties or judicial circuits may make orders, in recess of their several courts, in cases of law, and may require in writing the original papers on any case, or abstracts and transcripts, to be produced before them, or either of them, wherever they or either of them may be, for the purpose of passing such order, and in all criminal cases wherein the accused has been allowed to give bail; but, if the court shall adjourn before he has secured the bail, the clerk of the court may take the bail, on its being directed by order of the court before adjournment, or of one of the judges after adjournment, fixing the amount thereof; but the clerk shall accept no security without the oath or affirmation of the person offering himself as security, that he or she is worth the amount of the bail in real or personal estate, exclusive of his or her right to exemption; nor unless the clerk shall be satisfied of the truth of such statement on oath or affirmation; and, whenever a party is arrested on indictment in any of the Circuit Courts and is imprisoned during the recess of the court, any judge thereof, if it be a bailable case, may, by his order in writing, fix the bail and direct the clerk to take the same, with security or securities, who shall justify on oath or affirmation as hereinbefore provided, and no security shall be taken whom the clerk is not fully satisfied to be worth the amount sworn to.[1]

Whenever any recognizance taken for the appearance of any person to answer, or of any person to testify, shall be forfeited in any court of record, the State's attorney may order a writ of execution to be issued for the sum or sums thereon due.[2]

Whenever any execution has issued on a forfeited recognizance against a person for not appearing according to the tenor of the recognizance, such person, on the return of the execution, may appear and plead in discharge thereof

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[1] Code, art. 26, sec. 57; Mayor *v.* Tiddy, 63 Md. 514.

[2] Code, art. 75, sec. 18.

One who, on bail, has forfeited his recognizance, is liable, even after it is paid, to be rearrested and tried for his crime. Exp. Milburn, 9 Pet. 704. Mere insufficiency of bail, however, without fraud, does not constitute an escape justifying a rearrest. Ingram *v.* State, 27 Ala. 17.

any plea which would have been good and sufficient to a *scire facias* on said recognizance, if a *scire facias* had issued thereon; and, upon such plea being determined in favor of the person pleading the same, he shall be discharged from the said forfeiture; provided, such person shall not be discharged from such execution until the trial of the plea, unless he shall pay and satisfy the execution, or give bonds, payable to the State, before the sheriff, or enter into recognizance in court, with one good and sufficient security, in double the forfeiture and costs due upon such execution, conditioned to appear and plead in discharge of the said execution, and to abide by and fulfil the judgment of the court thereupon.[1]

The Governor may remit the whole or any part of any recognizance which may be forfeited, provided the judge of the court in which such forfeiture took place shall recommend the remission of the whole or some part thereof.[2]

If any security in any recognizance shall request to deliver up the principal, the Criminal Court of Baltimore, or the judge thereof in recess, may accept such surrender and may require and take other recognizance, or commit the principal to jail until he gives such security as the law requires.[3]

§ 57.—**Recognizance of Witnesses.**—If the magistrate determines to hold the accused to appear at court, he thereupon commits him and the witnesses, or takes their several recognizances, as the case may require.[4]

Where a witness against any person accused of a crime cannot find security for his appearance to testify against the person so accused and for want of such security shall be committed to prison, the county where the prosecution shall be carried on shall be chargeable with and pay the imprisonment fees of such witness, and the county commissioners, or the Mayor and City Council of Baltimore shall levy the same, from time to time, as the case may require.[5]

[1] Code, art. 75, sec. 19; Schultze *v.* State, 43 Md. 295.
[2] Code, art. 41, sec. 8.
[3] Code P. L. L. art. 4, sec. 200.
[4] 1 Bishop Cr. Proc. § 234 b.
[5] Code, art. 35, sec. 30.

§ 58.—**Transmitting Case to Court.**—All commitments and recognizances for offenses committed within the City of Baltimore are to be returned, from time to time, by the committing magistrates to the Criminal Court, and shall be lodged with the clerk of said Court on the day next preceding the day appointed for holding the said Court.[1] In the counties, recognizances and commitments must be returned to the Circuit Courts. When the magistrate has transmitted the papers to court, his functions are ended.

§ 59.—**Referring Case to Grand Jury.—Summary Proceeding in Baltimore.**—When the recognizance or commitment, as the case may be, has been filed in court, the next step in the ordinary course of procedure is to refer the matter to the grand jury for its action. In the City of Baltimore, however, persons who have been committed by justices of the peace for want of bail for trial on charges of assault and battery, keeping a disorderly house, violations of the article of the Code relating to Licenses, or for any other small offenses for which no greater punishment than fine and imprisonment can be imposed, may have their causes heard and determined in a summary way, if they so elect, by the court, without the aid of a jury, on the Saturday next succeeding the commitment; and, in such case, only half the costs established by law in cases of indictment found by a grand jury are taxed. All cases for the violations of the Public General Laws relating to Licenses may be tried upon presentment and be likewise chargeable with only half costs.[2]

§ 60.—**Grand Jury.—Presentment.—Indictment.—Information.**—In all cases except those referred to in the foregoing section and cases of summary convictions before inferior magistrates, prosecutions must be upon a previous finding of fact or inquest by a grand jury. The procedure known as an *appeal of felony*[3] is now entirely obsolete. The proceeding by *information*[4] is now likewise unknown in the criminal practice of this State. A presentment, in the

[1] Code P. L. L. art. 4, sec. 183.

[2] Code P. L. L. art. 4, secs. 184-186, 188.

[3] 4 Bla. Comm. 312; Soaper *v.* Negro Tom, 1 H. & McH. 227.

[4] 4 Bla. Comm. 308; Kilty Rep. 235; Alexander Br. St. 410; Proprietary *v.* Farthing, 1 H. & McH. 62.

enlarged sense of the term, includes not only presentments properly so called, but also inquisitions of office and indictments by a grand jury.[1] In this State, a presentment signifies an informal written presentation by the grand jury of an offense, upon which the State's attorney afterwards frames a bill of indictment, which is then sent to the grand jury and, if adopted by them, endorsed "a true bill," and signed by the foreman. A variance between the presentment and the indictment is immaterial; when once an indictment has been found, the subsequent proceedings are based upon it alone, the presentment being superseded.[2]

Jurors are drawn by the judges of the Circuit Courts of the counties according to a careful plan detailed in the Code of Public General Laws,[3] and the grand jurors are drawn from the list of jurors so obtained, at the beginning of each term, the foreman, however, being appointed by the court.[4] In Prince George's County a somewhat different system prevails,[5] the number of grand jurors consisting of twenty-three instead of twenty-four, as in the other counties. The drawing of petit and grand jurors for the City of Baltimore is regulated by local laws,[6] twenty-three grand jurors being selected by the judges of the Supreme Bench, of which number one is designated as foreman by the judge of the Criminal Court of Baltimore. In England and in all our states, twelve of the grand jurors must consent in order to render a finding valid; nor need more than twelve, even though the grand jury should consist of the full number of twenty-three.[7]

The grand jurors, being assembled in the court-room at the beginning of the term and the foreman having been selected, they are next sworn by the clerk in the following form:

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[1] 4 Bla. Comm. 301.

[2] Laird *v.* State, 61 Md. 309.

[3] Art. 51, title "Juries."

[4] Ib., sec. 16.

[5] Code P. L. L. art. 17, secs. 167-170.

[6] Code P. L. L., art. 4 secs. 538-606.

[7] 1 Bishop Cr. Proc. § 854.

At common law a grand jury consists of not less than twelve nor more than twenty-four persons, and is selected by the sheriff.

Oath of the Foreman. You,————, as foreman of the grand inquest of the State of Maryland, for the body of ————, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge, touching this present service; the counsel of the State of Maryland, your fellows, and your own, you shall well and truly keep secret; you shall present no person through envy, hatred, malice or ill will; neither shall you leave any one unpresented through love, fear, favor or affection, or for any hope or promise of reward, but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God.

Oath to the other Jurymen, three at a time. The same oath that ———, your foreman, hath taken on his part, you and each of you, on your respective parts, shall well and truly observe and keep. So help you God.[1]

This oath contains the substance of the duties of the grand jury. After the jurors have been sworn, the court delivers a charge to them in relation to their functions and duties and such matters falling within their cognizance as are of special public importance. Courts are required by different statutes to give in charge to the grand jury the provisions of the laws relating to abortion,[2] defaulters,[3] the protection of life and property in Baltimore and other cities.[4] The Criminal Court of Baltimore shall, at each term, charge the grand jury attending to inquire into the conduct and management of the warden, assistant warden and officers of the Penitentiary, and make presentments of all offenses and omissions of the said warden, assistant warden and officers in and relating to the said Penitentiary; and the said Court shall, at the terms aforesaid, direct a number, not exceeding six of the said grand jurors, to visit

[1] 2 Harr. Ent. 3; 2 Ev. Harr. 282; 1 Bishop Cr. Proc. § 856.

[2] Code, art. 27, sec. 4.

[3] Ib., sec. 47.

[4] Code P. L. L., art. 4, secs. 125-128.

and examine the said Penitentiary.[1] The Criminal Court of Baltimore is likewise directed to give the provisions of the article of the Code of Public Local Laws in relation to elections in said City in charge to each grand jury which shall be in session at the time of any election held in said City or next thereafter.[2]

If the essential requirements of a statute relating to the constitution of the grand jury are disregarded, that body has no authority to act and any indictment found by it is void. The right of objection to the grand jury is not confined to the challenge to the array, but objection, whether to individual jurors or to the constitution of the whole body, may be taken by plea in abatement, or motion to quash after bill found and before plea to the merits;[3] but not after judgment, by motion in arrest thereof.[4] Yet, although there may be technical objections, to the proceedings in regard to the selection and summoning of grand jurors, in point of strict regularity, the courts will not set them aside, unless satisfied that they have resulted, or may result, to the prejudice of the party accused;[5] the possibility that injury has been done in the particular case must not be remote and conjectural.[6]

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[1] Code, art. 27. sec. 412.

[2] Code P. L. L., art. 4 sec. 267.

No grand jury sitting at the time of any election in said City or assembling next thereafter shall be discharged by the said Court until they have made written presentment on their oaths to the said Court, that they have diligently and to the best of their knowledge and ability examined such judges of election as may have come before them and inquired into and acted upon all complaints concerning alleged violations of the Constitution and laws touching elections, at the election next preceding, and all matters concerning the same which have come to their knowledge, or concerning which they have had information or reasonable ground of inquiry. Ib., sec. 266.

[3] Clare *v.* State, 30 Md. 163; Green *v.* State, 59 Ib. 123.

[4] Green *v.* State, *supra.*

[5] State *v.* Glascow, 59 Md. 209.

[6] Cooper *v.* State, 64 Md. 40, 47.

CHAPTER VI.

Special Proceedings.

§ 61.—**Scope of Chapter.**—The foregoing chapter having treated of the preliminary proceedings in a criminal prosecution, to the time of the selection and qualification of the grand jury, the next subject in the regular order of such prosecution that calls for consideration is the indictment. Before, however, proceeding with this subject it is thought well to take up the discussion of certain special proceedings which should be discussed in this work and for the discussion of which this is considered the most convenient place.

The proceedings forming the subject of this chapter are *summary proceedings before magistrates*, *proceedings in relation to minors*, *search warrants* and *peace warrants*.

§ 62. — **Summary Proceedings. — Definition.** — By the term summary proceedings, within the meaning of this chapter, are designated all proceedings before justices of the peace and other similar magistrates, in which these officials have jurisdiction to pronounce a judgment or to commit an offender, when their adjudication is either absolutely final, or made final by the waiver of rights or submission by the party accused.

§ 63.—**Drunkenness and Disorderly Conduct.**—Every person who shall be found drunk, or acting in a disorderly manner, to the disturbance of the public peace, upon any public street or highway, in any city or county of this State, or at any place of public worship or public resort or amusement, in any city or county of this State, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to a fine of one dollar and costs, and shall be committed until such fine and costs are paid, or until such offender is discharged by due course of law. The justices of the peace for the respective counties of this State shall have concurrent jurisdiction over such offense with the Circuit Courts for their respective counties, and the

justices of the peace selected to sit at the station houses in the City of Baltimore shall have concurrent jurisdiction over such offense with the Criminal Court of Baltimore. This section not to apply to Frederick County.[1]

§ 64.—Jurisdiction of Police Justices in Baltimore City.—It shall be the duty of each justice of the peace so selected to sit at any station house in the City of Baltimore to hear all charges made against any person, because of the alleged commission by such person of any criminal offense; it shall be the duty of each of said justices to examine carefully into every such charge, to the end that, while justice shall be done, no person shall be subjected to costs or imprisonment without sufficient cause; each of said justices of the peace shall have power to hear, try and determine the case of every person who may be arrested and brought before him in the said City of Baltimore charged with being a tramp, who is or may be punishable as such under sections 275 and 276 of article 27 of the Code of Public General Laws, title "Crimes and Punishments;" and to hear, try and determine the cases of all persons arrested and brought before him charged with any offense specified in sections 67 or 68 of the same article, or in sections 894–897 of this article, subtitle "Vagrant Children;" and to hear, try and determine all prosecutions or criminal proceedings brought before him for any act done, or omitted to be done, in the City of Baltimore, the doing of which act or the omission to do which act is or may be punishable under any act of Assembly of this State or under any ordinance of the Mayor and City Council of Baltimore by a pecuniary fine only not exceeding in amount the sum of one hundred dollars. It is, however, hereby expressly provided, that the said justices shall not have power to try and determine any violation of the Code of Public General Laws of this State, relating to licenses, except violations of the laws relating to "Hawkers and Peddlers," which they shall have jurisdiction to try and determine; and shall not have power to try and determine any violations of the laws relating to "Sabbath-breaking," but shall cause all such offenders against the said provisions of said Code of

[1] Code, art. 27, sec. 68

Public General Laws, except as aforesaid, to be committed or held to bail for trial before the Criminal Court of Baltimore.[1]

In all criminal prosecutions or proceedings which, under the provisions of the preceding section, may be heard, tried and determined before a justice of the peace sitting at a station house in the City of Baltimore, it shall be the duty of such justice of the peace before whom such case is tried, in the event of the conviction of the accused at the said trial, to impose upon the said accused so convicted the fine or the fine and punishment, prescribed, in case of such conviction, by the act of Assembly of this State, or by the ordinance of the Mayor and City Council of Baltimore, for the violation of which the accused was so tried. Any person sentenced to the payment of any fine and to the payment of the costs of his or her prosecution, who shall not forthwith pay the said fine and costs of said prosecution, shall be committed by such justice of the peace to the jail of Baltimore City until such fine and costs are paid, or until the said person shall be discharged from such jail by due course of law.[2]

If any person charged with any of the offenses hereinbefore referred to shall, when brought before any justice of the peace sitting at a station-house in the City of Baltimore, before the beginning of his actual trial for such offense, pray a jury trial it shall be duty of such justice of the peace to commit such alleged offender for trial before the Criminal Court of Baltimore, or to hold the said alleged offender to good and sufficient bail, to appear for trial before the Criminal Court of Baltimore at its next sitting, and to endorse upon said commitment or recognizance the names and residences of the witnesses for the prosecution; and such commitment or recognizance so endorsed shall be returned forthwith to the clerk of the said Criminal Court of Baltimore.[3]

§ 65—Summary Jurisdiction of Justices of the Peace in Certain Counties.—The several justices of the peace

[1] Code P. L. L., art. 4, sec. 615.
[2] Ib., sec. 616.
[3] Code P. L. L., art. 4, sec. 617.

of Montgomery, Kent, Charles, Howard, Caroline, Calvert, Harford, Garrett, Dorchester, Prince George's, St. Mary's, Somerset, Talbot, Washington, Wicomico, Anne Arundel and Allegany counties shall have, in addition to the jurisdiction which they now possess and which may be conferred upon them by or under the laws of this State, jurisdiction concurrent with that exercised by the Circuit Courts for said counties in all cases of assault without any felonious intent; and in all cases of assault and battery; and in all cases of petit larceny, when the value of the property stolen does not exceed the sum of five dollars; and in all misdemeanors not punishable by confinement in the Penitentiary, which may be committed within their respective jurisdictions; and shall have jurisdiction in all prosecutions or proceedings for the recovery of any penalty for doing or omitting to do any act the doing of which or the omission to do which is made punishable under the laws of this State, within their said jurisdiction, by any pecuniary fine or penalty or by imprisonment in jail or in the Maryland House of Correction; all of which acts or commissions are hereby declared to be criminal offenses; and the said justices shall have power to issue all process and to do all acts which may be necessary to the exercise of their said jurisdiction, and may try and determine all cases whereof they may have jurisdiction and may pronounce judgment and sentence therein in the same manner and to the same extent as the Circuit Courts for said counties could in such cases, if such cases were tried before them without the intervention of a jury; provided, however, that if any person, when brought before any such justice having jurisdiction of the case, shall, before trial for the alleged offense, pray a jury trial on the part of the State, it shall be the duty of any such justice to commit such alleged offender for trial or to hold said offender to bail to appear for trial in the Circuit Court for the county in which the offense was committed, at its then session, if it be then in session, or at its next session, if it be not then in session, and to return said commitment or recognizance, with the names and residences of the witnesses for the prosecution endorsed thereon, forthwith to the clerk of the said court; and the justice before whom the

case is tried shall inform the person charged of his right to a jury trial.[1]

§ 66.—**Tramps.**—Every person, not insane, who wanders about in this State and lodges in market-houses, market-places, or in other public buildings, or in barns, outhouses, barracks, sheds, or in the open air, without having any fixed place of residence, and without having any lawful occupation in the city, town or county in which he may so wander, and without having any visible means of support, shall be deemed to be a tramp and to be guilty of a misdemeanor, and shall be subject to imprisonment in the Maryland House of Correction for a period of not less than two months nor more than one year. This section not to apply to Allegany County.[2]

The respective justices of the peace in the respective counties of this State shall have concurrent jurisdiction with the Circuit Courts for their respective counties, and the justices of the peace selected to sit at the respective station-houses in the City of Baltimore shall have concurrent jurisdiction with the Criminal Court of Baltimore in the cases of persons arrested as tramps; and such respective justices shall proceed to hear and determine such cases when the parties arrested as tramps are brought before them, respectively, and to acquit such persons or to sentence them for such offense, if convicted; unless such respective persons so charged, when so brought before them, respectively, and before they are respectively tried as aforesaid, shall pray a jury trial. If any person charged with being a tramp, brought before a justice of the peace selected to sit at a station-house in the City of Baltimore, shall pray a jury trial as aforesaid, it shall be the duty of the said justice of the peace to commit such person for trial or to hold him to bail to appear before the Criminal Court of Baltimore on the next succeeding Saturday of the session of the said court, and to return the commitment or recognizance in such case to the clerk of the said court on or before the day next preceding the next Saturday session of said court; and, if any person charged with being a

[1] Code P. L. L., art. 5, sec. 93.

[2] Code, art. 27, sec. 275.

tramp, brought before a justice of the peace for any county in this State, shall pray a jury trial as aforesaid, it shall be the duty of the said justice of the peace to commit such person for trial or to hold him to bail to appear for trial before the Circuit Court for the county in which such person was arrested, at the pending term of said Circuit Court, if it be then in session, or at the next term thereof, if it be not then in session. Such respective justices of the peace shall endorse upon the commitment or recognizance of any such person so praying a jury trial the names and places of residence of the witnesses on behalf of the prosecution, and shall cause such respective witnesses to enter into recognizance for their respective appearance against such person in the court into which such commitment or recognizance for the appearance of the party charged is returned, at the time prescribed for the appearance in such court of the person so charged. This section not to apply to Allegany County.[1]

§ 67.—**Vagrant Laws for Baltimore City.**—Paupers, habitual beggars, vagrants, vagabonds or disorderly persons, may be arrested in Baltimore City and brought before the Criminal Court or a justice of the peace and may be sent to the almshouse or such other suitable place as may be provided for such purpose by the corporation. In either case the party charged may demand a jury trial. If demanded before a justice of the peace, the case must be certified to the Criminal Court to be proceeded with and tried as if the same had been originally brought before said court. Special provision is made for the case of minors.[2]

§ 68.—**Certiorari when Justice of the Peace exceed their Jurisdiction.**—The process by *certiorari* is the appropriate and well-known mode by which the superior courts examine into the authority of an inferior tribunal and ascertain whether it has transcended the special powers to which it is limited by law.[3] When a justice of the peace, therefore, proceeds against a party accused without legal power or jurisdiction, the proceedings may by this writ be

[1] Code, art. 27, sec. 276.

[2] Code P. L. L., art. 4, secs. 878-893.

[3] Swann *v.* Mayor, 8 G. 150.

brought before a superior court of record.[1] The writ must be issued, upon the order of a judge or of the court, by the clerk thereof, under the seal of the court, and be made returnable into the same court.[2] It cannot be directed to any officer or magistrate of inferior jurisdiction beyond the limits of the county from whose Circuit Court it may issue.[3]

§ 69.—**Proceedings in Relation to Minors—Their Nature—Constitutionality of Statutes.**—Justices of the peace and other officials are vested by various statutes with authority to commit minors to the care and guardianship of juvenile institutions. The proceeding in such cases is not a criminal proceeding, and no regular *trial* is necessary to authorize the commitment of minors to houses of refuge and reformatories when such course is rendered necessary or requisite to their moral and future welfare. The right of the state, or government to intervene in such cases is fully established.[4] Third parties, whether parents, guardians or others, can set up no rights or claims to interfere with a proper disposition and care of the minor. No one can claim a right, in the ordinary sense of the term, to the control or guardianship of a minor.[5] The domestic relations are under the control and regulation of municipal

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[1] Hall *v.* State, 12 G. & J. 329; Rayner *v.* State, 52 Md. 368.

[2] State *v.* Glenn, 54 Md. 572, 610.

[3] Ib.

[4] Roth *v.* House of Refuge, 31 Md. 329; Exp. Crouse, 4 Whart. 9; Milwaukee Ind. School *v.* Supervisors, 40 Wis. 328; Prescott *v.* State, 19 O. St. 184; In re Kruse, 2 Cinn. Sup. Ct. R. 71; House of Refuge *v.* Ryan, 37 O. St. 197; Farnham *v.* Pierce, 141 Mass. 203; In re Donohue, 1 Abb. New Cas. 1; S. C., 52 How. Pr. 251; People *v.* Turner, 55 Ill. 280; S. C., 10 Am. L. Reg. 366; In re Ferrier, 103 Ill. 367; McLean *v.* Humphry, 104 Ib. 378.

[5] 1 Bla. Comm. 452; 2 Kent Comm. 204; In re Moore, 11 Ir. C. L. N. S. 1, 14; In re Connor, 16 Ir. C. L. N. S. 112, 124; Mercein *v.* People, 25 Wend. 64, 103; Striplin *v.* Ware, 36 Ala. 87; Albert *v.* Perry, 14 N. J. Eq. 540; In re Lewis, 88 N. C. 31; The Etna, 1 Ware, 462; Wodell *v.* Coggeshall, 2 Metc. 89; Gary *v.* James, 4 Desauss. 185; Stansbury *v.* Bertron, 7 W. & S. 362; U. S. *v.* Green, 3 Mason, 482; Comm. *v.* Gilkeson, 10 Penna. L. J. 505; S. C., 1 Phila. 194; Exp. O'Neal, 3 Am. L. Rev. 578; Exp. Schumpert, 6 Rich. S. C. 344; In re Gregg, 5 N. Y. Leg. Obs. 265; People *v.* Porter, 23 Ill. App. 196.

laws.[1] Thus, the matter of fixing the period of minority,[2] the disabilities and immunities attaching to the status of infancy, the right of custody, the matter of education,[3] the matter of the sale of liquor to minors, with or without the consent of parents or guardians,[4] are all within legislative and judicial control. Where, however, the proceeding against a minor has for its object his punishment for crime, even though the commitment be to a juvenile institution, all the regular formalities of criminal procedure must be observed;[5] and where the proceeding is *quasi* criminal, as under statutes authorizing the commitment of minors to juvenile reformatories upon complaint of incorrigibility preferred by parents or guardians, the powers of commitment are strictly construed.[6]

§ 70.—**Commitment of Mendicant and Vagrant Children.**—Any person, having in his care, custody or control any child under the age of sixteen years, whether as parent, guardian, relative, employer or otherwise, who shall sell, apprentice, or give away, let out or otherwise dispose of any such child to any person, under any name, title or pretense whatever, and any person, whether as parent, guardian, relative, employer or otherwise, who shall take, receive, hire, employ, use or have in custody any such child for the vocation, use, occupation, calling, service or purpose of singing, playing on musical instruments, rope-walking, dancing, peddling, begging or any mendicant or wandering business whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any competent tribunal to which such person may be committed for trial, shall be fined not less than fifty nor more than two hundred and fifty dollars, or be imprisoned in a county jail for not less than thirty days nor more than a year, or suffer both such fine and imprisonment, in the discretion of the said tribunal, one-half of all fines so imposed to be paid

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[1] Bennet *v.* Bennet, 13 N. J. Eq. 114.

[2] Parker *v.* Starr, 21 Neb. 680.

[3] Bennet *v.* Bennet, *supra.*

[4] State *v.* Clottu, 33 Ind. 409; State *v.* Lawrence, 97 N. C. 492.

[5] Comm. *v.* Horregan, 127 Mass. 450; State *v.* Ray, 63 N. H. 406.

[6] Comm. *v.* McKeagy, 1 Ashm. 251.

to the informer.[1] If, on examination before any court or justice of the peace, it shall be proved, that any child was engaged in any business or vocation designated or mentioned in the preceding section, such child shall be deemed a vagrant and committed to any reformatory institution to which vagrant minors may be committed under the laws of this State.[2]

§ 71.—**Commitment of Vagrant Children in Baltimore.**—No minor, if a girl, under the age of sixteen years, or, if a boy, under the age of fourteen years, shall be admitted to or permitted to remain in any saloon, place of entertainment or amusement, known as dance-houses, concert saloon, theatre or varieties, where immoral, indecent, obscene or vulgar language, display or performance is permitted, allowed or carried on, or where any spirituous liquors, wines, intoxicating or malt liquors are sold, exchanged or given away, unless accompanied by parents or guardian. Any proprietor, keeper or manager of any such place who shall admit such minor to or permit him or her to remain in such place, unless accompanied by parent or guardian, shall be guilty of a misdemeanor, and shall, upon conviction by any court of competent jurisdiction, be fined ten dollars and costs for each and every offense.[3] Every person having the custody of any girl under the age of sixteen years, and of any boy under the age of fourteen years, shall restrain such child from habitually begging, whether actually begging or under the pretense of peddling. Any person offending under this section shall be considered and deemed as incapable of taking care of and providing for such child, and such child shall, by reason thereof, be deemed as coming within the conditions of the next succeeding section.[4] Any girl apparently under the age of sixteen years and any boy apparently under the age of fourteen years that comes within any of the following descriptions named: that is known to be habitually begging or receiving or gathering alms, whether actually begging

[1] Code, art. 27, sec. 273.
[2] Ib., sec. 274.
[3] Code P. L. L., art. 4, sec. 894.
[4] Ib., sec. 895.

or under the pretense of peddling or offering for sale anything, or being in any street, road or public place for the purpose of so begging, gathering or receiving alms; that is found wandering and not having any home or settled place of abode or proper guardianship, or visible means of subsistence; that is found destitute, either being an orphan or having a vicious parent who is undergoing penal servitude or imprisonment; that frequents the company of reputed thieves or prostitutes, or houses of assignation or prostitution, or dance-houses, concert saloons, varieties, or places specified in section 894 hereof, without parent or guardian, shall be arrested and brought before a court or magistrate. When, upon examination before a court or magistrate, it shall appear that any such child has been engaged in any of the aforesaid acts, or comes within any of the aforesaid descriptions, such court or magistrate, when it shall deem it expedient for the welfare of the child, shall commit such child to an orphan asylum, charitable or other institute, or make such other disposition thereof as now is or may hereafter be provided by law in case of vagrants, truant, disorderly, pauper or destitute children; provided, however, that none of the provisions of this subtitle shall be construed so as to prevent children from selling or offering for sale newspapers.[1] Any person representing himself or herself to be, or passing himself or herself off as the parent or guardian of a child or children referred to in any of the aforesaid sections of this subtitle, when it shall appear that such person is not either the parent or guardian of said child, shall be deemed guilty of a misdemeanor, and, upon conviction by any court of competent jurisdiction, shall be fined not more than twenty dollars and costs for each and every offense.[2]

§ 72.—**Destitute and Suffering Minors.—Commitment.**—Any minor, having no parent or guardian and being destitute of means of support, or suffering through the neglect, bad habits or vicious conduct of its parent, guardian or other custodian, may be arrested and brought before any judge of a court of record or justice of the peace and committed

[1] Code P. L. L. art. 4, sec. 896.

[2] Ib., sec. 897.

by said judge or justice of the peace to any charitable, reformatory or other institution for the care and custody of minors, incorporated under the laws of this State, subject to the discipline, regulations and powers of such institutions.[1] Upon the return of any writ of *habeas corpus* issuing for the production of any child so committed, the court or judge before whom the *habeas corpus* proceeding is tried may review the facts upon which the commitment was made, and hear new evidence, and remand, release or commit such minor.[2]

§ 73.—**Juvenile Institutions.**—The foregoing statutes, in a large measure, supersede the necessity of proceeding under laws relating specifically to particular institutions. It should be noted, however, that special provisions for the commitment of minors are to be found in regard to the following institutions: House of Refuge,[3] Female House of Refuge,[4] House of the Good Shepherd,[5] St. Mary's Industrial School for Boys,[6] House of Reformation,[7] Industrial Home for Colored Girls,[8] Home of the Friendless,[9] Boys' Home,[10] Henry Watson Children's Aid Society,[11] Dolan Children's Aid Society,[12] Hebrew Orphan Asylum,[13] Protestant Infant Asylum,[14] St. Vincent's Infant Asylum,[15] St. Mary's Orphaline School,[16] Asylum and Training School for the Feeble Minded,[17] The Nursery and Child's Hospital of Baltimore City.[18]

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[1] Code, art. 42, sec. 18.
[2] Ib., sec. 19.
[3] Code, art. 27, secs. 351–371.
[4] Ib., secs. 372, 373.
[5] Ib., secs. 321–329.
[6] Ib., secs. 384–388.
[7] Ib., secs. 330–350.
[8] Ib., secs. 374–383.
[9] Code P. L. L., art. 4, secs. 903–907.
[10] Ib., secs. 898–900.
[11] Ib., sec. 911.
[12] Ib., sec. 901.
[13] Ib., sec. 902.
[14] Ib., sec. 908.
[15] Ib., secs. 909, 910.
[16] Laws 1818, ch. 71; 1886, ch. 172; 1888, ch. 159.
[17] Laws 1888, ch. 183.
[18] Laws 1888, ch. 426.

Questions of the regularity of the commitments to such institutions, so far as matters of mere form are concerned, are obviated by the following statutory provision:

> Whenever a minor is brought before a court or judge upon *habeas corpus*, in private custody, it shall be the duty of such court or judge, in the determination of the case, to be guided by what appears to be for the best interests of such minor, in respect to his temporal, his mental and his moral welfare; and, if it be made to appear, to the satisfaction of such court or judge, that such interests would be best promoted by such course, it shall be the duty of such court or judge to commit such minor to the care and custody of any charitable, reformatory or other institution for the care and custody of minors, incorporated under the laws of this State, subject to the discipline, regulations and powers of such institution; and any court or judge disposing of the custody of a minor upon *habeas corpus* may retain jurisdiction over such minor, and may make such other and further orders in relation to the care and custody of such minor as circumstances may require.[1]

§ 74.—**Search-Warrants.**—A search-warrant is a warrant requiring the officer to whom it is addressed to search a house or other place therein specified, for property therein alleged to have been stolen, and, if the same shall be found upon such search, to bring the goods so found, together with the body of the person occupying the same, who is named, before the justice or other officer granting the warrant, or some other justice of the peace or other lawfully authorized officer.[2]

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[1] Code, art. 42, sec. 20.

The custody of a charitable or reformatory institution to which a minor is committed for mere care and guardianship, as distinguished from a commitment by way of sentence or punishment for crime, is *private custody*, this phrase, when applied to infants or minors, having a technical meaning, to wit, custody under claim of guardianship as distinguished from the custody of a public officer in virtue of his office. R. *v.* Delaval, 3 Burr. 1434. The institutions enumerated are not classed as public institutions. St. Mary's Ind. School *v.* Brown, 45 Md. 310; Perry *v.* House of Refuge, 63 Ib. 20.

[2] Bouvier Law D., tits. *Search-Warrant*.

The Declaration of Rights asserts, That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place or the person in special, are illegal and ought not to be granted.[1]

The use of search-warrants, at common law, appears to be limited to the search for stolen goods.[2] A search-warrant to seize libels and other papers of a suspected party is illegal.[3] Statutes in this State authorize the seizure, by means of this process, of arms, weapons and ammunition intended to be used for the purpose of interfering with the freedom of elections[4] and to enter places where unlawful gaming is carried on,[5] or where gunpowder is unlawfully stored.[6]

The search-warrant is not to be granted without oath made before the justice, that the party complaining has probable cause to suspect that his property has been stolen, or is concealed in such a place, and showing the reasons for such suspicion. The oath need not positively and directly aver that the property has been stolen. The warrant should direct the search to be made in the daytime, though, it is said, that where there is more than probable suspicion, the process may be executed in the night. It ought to be directed to a constable or other public officer, and not to a private person, though it is fit that the party complaining should be present and assisting, because he will be able to identify the property he has lost. It should also command that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs.[7]

[1] Art. 26.
[2] 1 Bishop Cr. Proc. § 241.
[3] 1 Chitty Cr. L. 65.
[4] Code P. L. L., art. 4, sec. 270.
[5] Baltimore City Code, art. 21, sec. 4.
[6] Ib., art. 20, sec. 57.
[7] 1 Chitty Cr. L. 65.

With respect to the mode of executing this warrant, if the door be shut and, upon demand, not opened, it may be broken open, and so may boxes, after the keys have been demanded, and though the goods be not found, the officer will be excused, though, if the party obtaining the warrant acted maliciously, he will be liable to a special action on the case, but not to an action of trespass. But the officer must strictly observe the directions of the warrant, and, if, for instance, he be directed to seize only stolen sugar, and seize tea, he will be a trespasser.[1]

If, on the return of the warrant before the justice, it appear that the goods were not stolen, they are to be restored to the possessor. If it appear that they were stolen, they are not to be delivered to the proprietor, but deposited in the hands of the sheriff or constable, in order that the party robbed may proceed, by indicting and convicting the offender, to have restitution. The party who had the custody of the goods is to be discharged, if they were not stolen; and, if they were, not by him, but by another person, who sold or delivered them to him, and it appear that he was ignorant of the mode in which they were procured, he may be discharged, but bound over to give evidence as a witness against him that sold them; if it appear that he knew them to be stolen, then he should be bound over to answer the felony.[2]

§ 75.—**Peace Warrants.**—Surety of the peace is one of the branches of preventive justice, and consists in obliging those persons whom there is probable ground to suspect of future misbehavior to stipulate with and give full assurance to the public that such offense as is apprehended shall not happen, by finding pledges or securities for keeping the peace. One who seeks surety of the peace against another must apply to some justice of the peace and take the required oath, in which among other things, he must swear that he does not ask it "out of malice or for vexation." This is an important part of the oath and should never be omitted, for great caution should be observed

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[1] 1 Chitty Cr. L. 66.

[2] Ib. 67.

For form of warrant see Latrobe Just. 377.

by the magistrate, especially where the application seems to arise from malice; and the writ should never be granted merely because the applicant is at variance with another. When this oath is duly taken, the justice issues the warrant, which, after reciting the oath, commands the sheriff or other officer to apprehend the party and bring him before the subscriber, or some other justice, to find surety for his appearance at the next Circuit Court of the county as also for keeping the peace in the meantime towards the citizens of the State and chiefly towards the complainant. When he is arrested and brought before the magistrate, he is at once required to give the requisite security, and if he refuses or fails to do so, he is committed to jail until he finds such security or is discharged by due course of law. If he gives the security immediately or before the next court, the magistrate releases him from custody. The condition of the recognizance is that the party shall well and truly make his appearance to the next Circuit Court, there to receive what the court may enjoin upon him, and, in the meantime, to keep the peace as stated in the warrant; and the recognizance is then returned to the court. If the party remains in jail, or appears according to the tenor of his recognizance, and the complainant does not appear to ask its continuance, the court, as a matter of course, releases him from custody, or discharges the recognizance, as the case may be. If, however, the complainant does appear, and seeks a continuance of the proceeding, then the court, on a full examination of the evidence, as well on behalf of the complainant as the party accused, may release him, or discharge the recognizance, or order the proceeding to be continued.[1]

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[1] Hyde *v.* Grench, 62 Md. 577.

For forms of proceedings see Latrobe Just. ch. 16.

CHAPTER VII.

The Indictment.

§ 76.—**Prosecution By.**—If a statute enjoins an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature;[1] but an indictment does not lie upon a statute which creates a new offense and prescribes a particular remedy.[2]

§ 77.—**Formal Allegations.**—Prosecutions against offenders are relieved from a number of the technical refinements existing at common law by the following statutory provisions:

> No indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for any felony or misdemeanor, or upon any presentment, whether after verdict, by confession or otherwise, be stayed or reversed for the want of a proper or perfect venue, when the court shall appear by the indictment, inquisition or presentment, or by the statement of the venue in the margin thereof, to have jurisdiction over the offense, nor for the omission or misstatement of the title, occupation or degree of the defendant or other person or persons named in the said indictment, inquisition or presentment, nor for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*, nor for omitting to state the time at which the offense was committed, in any

[1] Keller *v.* State, 11 Md. 525, 536.

[2] R. *v.* Wright, 1 Burr. 543.

case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment or making the presentment, or on an impossible day, or on a day that never happened, or by reason of any mere defect or imperfection in matters of form which shall not tend to the prejudice of the defendant, nor for any matter or cause which might have been a subject of demurrer to the indictment, inquisition or presentment.[1]

It shall be sufficient in any indictment for forging, uttering, disposing of, putting off or passing any instrument whatsoever, or for obtaining any property by false pretenses, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and, on the trial of any of the offenses in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud. In any indictment for forging, altering, putting off, passing, stealing, embezzling, destroying, or for obtaining by false pretenses any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out a copy or fac-simile thereof, or otherwise describing the same. In all other cases, whenever it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known or by the purport thereof, without setting out any copy or fac-simile of the whole or any any part thereof.[2]

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[1] Code, art. 27, sec. 286.

[2] Ib., sec. 291.

Under these provisions indictments have been upheld in a number of instances, notwithstanding alleged omissions and defects, that would have been fatal at common law. Objections have been overruled in relation to the want of a *venue* in the body of the indictment, it being stated in the margin;[1] misstatement of the *condition or degree* of the defendant;[2] matters that should have been urged upon demurrer,[3] it being, however, held, that the defendant has an unconditional right to withdraw his plea and demur.[4]

§ 78.—**Certainty of Allegation.**—Certainty, to a reasonable extent, is an essential attribute of all pleading, both civil and criminal, but is more especially necessary in the latter, where conviction is followed by penal consequences. One of its objects is notice to the party of the nature of the charge, against which he is to come prepared to defend himself; and it is also necessary, not only that the offense may be displayed upon the record, so as to enable the court to pronounce the sentence of the law, but to enable the party to defend himself against a second prosecution for the same crime, by pleading a prior acquittal or conviction.[5] It is a general rule, that the special matter of the whole fact should be set forth in the indictment with such certainty that the offense may judicially appear to the court, and, as it must contain a specific description of the offense, it is not good if it only state a conclusion of law.[6] Nothing material may be taken by intendment or implication, but all the circumstances necessary to constitute the offense must be set out in the indictment.[7]

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[1] Wedge *v.* State, 12 Md. 232.

[2] Hammond *v.* State, 14 Ib. 135. Cf. State *v.* Hughes, 2 H. & McH. 479.

[3] Cochrane *v.* State, 6 Md. 400; Kellenbeck *v.* State, 10 Ib. 431; Cowman *v.* State, 12 Ib. 250; State *v.* Reed, Ib. 263; Davis *v.* State, 39 Ib. 355; Maguire *v.* State, 47 Ib. 485; Costley *v.* State, 48 Ib. 175; State *v.* Wade, 55 Ib. 39; Foote *v.* State, 59 Ib. 264.

[4] Cochrane *v.* State, *supra.*

[5] State *v.* Nutwell, 1 G. 54; State *v.* Bixler, 62 Ib. 354; Stewart *v.* State, Ib. 412.

[6] State *v.* Scribner, 2 G. & J. 246; State *v.* Bixler, *supra.*

[7] State *v.* Hodges, 55 Md. 127. Cf. Jones *v.* State, 68 Ib. 613.

§ 79.—**Names of Third Persons.**—In accordance with the doctrine requiring certainty in the indictment, it has, in a number of instances, been held necessary to set out the names of third persons. Where a statute prohibited the sale of liquor to slaves without the consent of the master, an indictment for its violation was held to be defective for omitting the name of the slave and that of the master;[1] an indictment charging the sale of liquor on Sunday must allege the name of the person to whom the same was sold,[2] and an indictment for the sale of merchandise, in violation of the license laws, must set forth the name of the person to whom the sale was made.[3] The sale of liquor without license, or to minors, or on a Sunday or election day to a particular person is an offense in this State; each sale is a separate offense and the party may be indicted for each; but the case is different upon an indictment against a register of voters for making out and publishing a false list of voters stricken from the registry. The indictment need not specify the names of the voters alleged to have been published in the list as stricken from the registry. Such list becomes false by including therein the names, whether few or many, of the voters who had not been stricken off. The offense is one and entire, and there cannot be separate indictments for each name thus wrongfully included.[4]

§ 80.—**Allegation of Circumstances Constituting Illegality.**—Where the act charged is not in itself necessarily unlawful or criminal, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists. Thus, the willful obstruction of a road or way constitutes an indictable offense only when the road or way is public and the obstruction tends to the inconvenience of the common right to use it; hence, an indictment for obstructing a highway which, in one count, described the obstructed road as "a common highway, leading from Sarah Standi-

[1] State *v.* Nutwell, 1 G. 54.
[2] Capritz *v.* State, 1 Md. 569.
[3] Spielman *v.* State, 27 Ib. 520.
[4] Mincher *v.* State, 66 Ib. 227.

ford's gate toward the Baltimore and Philadelphia turnpike, to the house known as Berry's house," and, in another count, as "a common highway leading from Sarah Standiford's gate toward the Baltimore and Philadelphia turnpike," was adjudged defective. It was held, that the connection of the road with some other common thoroughfare, by means of which the public could have access to it, was a necessary element of the offense charged, and it should have been shown with certainty; the indictment should have shown that the road obstructed connected with and was accessible from a public highway.[1] But it is only where the act charged is not in itself unlawful, but becomes so by other things connected with it, that the facts in which the illegality consists must be set out. Therefore, where the giving away of intoxicating liquor on election days is made an offense by statute, an indictment charging the defendant, in the language of the statute, with unlawfully giving away whiskey, without setting forth the facts which make the giving unlawful, is sufficient, it not being necessary to state matter of evidence, unless it alter the offense.[2] Upon the same principle it was held, that, in an indictment for an assault with intent to murder, it is not necessary to state the instrument or means made use of by the assailant to effectuate the murderous intent. The means of effecting the criminal intent or the circumstances evincive of the design with which an act was done, are considered to be matters of evidence for the jury to demonstrate the intent, and not necessary to be incorporated in an indictment.[3]

§ 81.—Time and Place.—Time and place must be added to every material fact in an indictment; that is, every material fact stated in an indictment must be alleged to have been done on a particular day and at a particular place. It is, in general, in relation to time, requisite to state that the defendant committed the offense for which he was indicted on a specific day and year.[4] If an offense

[1] State *v.* Price, 21 Md. 448.

[2] Cearfoss *v.* State, 42 Ib. 403.

[3] State *v.* Dent, 3 G. & J. 8.

[4] State *v.* Brown, 24 S. C. 224. Cf. Jones *v.* State, 68 Md. 613.

consists in doing a thing on Sunday, the indictment, in addition to the day of the month and year, must aver that it was on Sunday, and not merely mention a day found to be Sunday by the calendar. If the day of the week is thus properly set out, the indictment will be good, though the day of the month given in it falls on some other day of the week.[1]

§ 82.—**Matters Unknown to Grand Jury.**—If the grand jury is informed of the material facts of an offense, but not of all its identifying circumstances and methods, it may make averment of the former according to its knowledge and excuse the not setting out of the latter by alleging that they are to the jurors unknown; but the want of description is only excused when the name cannot be known; and, if the grand jurors cannot state a fact necessary for the defendant to know in order to make his defense, they cannot indict him.[2]

§ 83.—**Technical Words.**—Where the offense charged, a misdemeanor, is an offense at common law, and is *itself manifestly illegal*, the averment that it was done *unlawfully* is not necessary. But the mere receipt of stolen goods, knowing them to be stolen, was not *per se* an offense at common law, because the owner may lawfully receive back his own goods, knowing them to be stolen, provided there be no agreement to favor the thief; or one may lawfully receive stolen property for the purpose of keeping the goods for the owner. Accordingly it was held necessary, in an indictment for this offense, to aver that the property was unlawfully received.[3]

In the case of an indictment for *arson*, the offense should be charged to have been done *wilfully* or *voluntarily* and *maliciously*, as well as feloniously,[4] and that the house was *burned*.[5]

[1] Hoover *v.* State, 56 Md. 584.

[2] 1 Bishop Cr. Proc. §§ 546–553; Reg. *v.* Stroud, 2 Moody, 270; S. C. 1 Car. & K. 187; State *v.* Nutwell, 1 G. 54; Capritz *v.* State, 1 Md. 569; Spielman *v.* State, 27 Ib. 520.

[3] State *v.* Hodges, 55 Md. 127.

[4] Kellenbeck *v.* State, 10 Md. 431.

[5] Cochrane *v.* State, 6 Md. 400.

It is improper, in an indictment for a misdemeanor, to aver that the act was done *feloniously*;[1] but upon an indictment for a felony such averment is necessary.[2]

§ 84.—**Surplusage.**—Every fact and circumstance laid in an indictment which is not a necessary ingredient in the offense may be rejected as surplusage, also, if there be any defect in the manner of stating such matter, the defect will not vitiate the indictment.[3] But matter unnecessarily stated in an indictment will render it bad, if it shows that no offense was committed, or that otherwise the prosecution is not maintainable. Such surplusage cannot be rejected.[4]

§ 85.—**Indictments Upon Statutes.**—In indictments for statutory crimes it is ordinarily sufficient to describe the offense in the words of the statute, and, if the defendant insists upon greater particularity, it is for him to show that, from the obvious intention of the legislator, or the known principles of law, the case falls within some exception to such general rule. But few exceptions to this rule are recognized.[5] Where the words of the statute are descriptive of the offense, it is necessary that the defendant should be brought within all the material words of the statute.[6] The statutory crime must be laid with reasonable certainty according to the true *meaning* of the law, and, to this end, it sometimes becomes necessary to do more than merely charge the offense in the words of the statute.[7]

If there be any exception contained in the same clause of the act which creates the offense, the indictment must show negatively that the defendant or subject of the indictment does not come within the exception; but, where the charge preferred, *ex natura rei*, as conclusively imports a negative of the exception as if such negative had been in express

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[1] Black *v.* State, 2 Md. 376; Barber *v.* State, 50 Ib. 161.

[2] State *v.* Hodges, 55 Md. 127.

[3] Rawlings *v.* State, 2 Md. 201; Richardson *v.* State, 66 Ib. 205.

[4] 1 Bishop Cr. Proc. § 482.

[5] Parkinson *v.* State, 14 Md. 184, 198; Cearfoss *v.* State, 42 Ib. 403; Gibson *v.* State, 54 Ib. 447; Mincher *v.* State, 66 Ib. 227, 234.

[6] State *v.* Elborn, 27 Md. 483; Kearney *v.* State, 48 Ib. 16.

[7] U. S. *v.* Reed, 1 Low. 232; Duvall *v.* State, 6 H. & J. 9; Bode *v.* State, 7 G. 326.

terms, this rule does not apply.[1] Where, after general words of prohibition, an exception is created in a subsequent clause or section, it must be interposed by the accused as a matter of defense.[2]

§ 86.—**The Conclusion.**—All indictments for offenses forbidden by any statute or statutes, or for offenses the punishment of which is contained in the same clause of any statute with the prohibition of the offense, may conclude as for offenses at common law; and where any offense which is a misdemeanor at common law may have been made a felony by statute, the misdemeanor shall not be merged in the felony, but the indictment may contain counts for the said felony and also for the misdemeanor.[3]

Formerly, where the offense was created by one statute and the punishment prescribed or affixed by another, the conclusion was required to be *contra formam statutorum;*[4] and where a statute created an offense which did not exist at common law, or changed the nature or degree of an offense existing at common law, it was held that it must conclude *contra formam statuti*, but that, if the statute only directed a different mode of punishment for a common-law offense, the conclusion might be *contra pacem.*[5] All indictments must conclude, "against the peace, government and dignity of the State."[6] In indictments for common-law offenses all beyond this is surplusage.[7]

§ 87.—**Joinder of Counts and Election.**—An indictment containing counts for felony and misdemeanor was held to be good at common law.[8] It is quite common to insert several counts in an indictment, stating the occurrence in different terms, that the indictment may, at the trial, cor-

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[1] State *v.* Price, 12 G. & J. 260; Hays *v.* State, 40 Md. 633; Gibson *v.* State, 54 Ib. 447.

[2] Bode *v.* State, 7 G. 326; Rawlings *v.* State, 2 Md. 201; Barber *v.* State, 50 Ib. 161; State *v.* Nicholson, 67 Ib. 1.

[3] Code, art. 27, sec. 287.

[4] State *v.* Cassel, 2 H. & G. 407.

[5] State *v.* Evans, 7 G. & J. 290.

[6] Const., art. 14, sec. 13. As to indictments for violation of municipal ordinances, see Code, art. 38, sec. 1.

[7] Richardson *v.* State, 66 Md. 205.

[8] Burk *v.* State, 2 H. & J. 426; State *v.* Sutton, 4 G. 494; Wheeler *v.* State, 42 Md. 563.

respond with the proof, for the State cannot always know what the evidence will be. This mode of pleading apprises the prisoner of the accusation in more precise language, and, at the same time, aids the jury in finding their verdict. But, as it is liable to abuse, the law allows the prisoner, where the nature of the case will permit, to require the prosecutor to elect on which count or counts he will proceed, and in some cases, he may demur.[1] Where the indictment contains several counts, charging two or more distinct offenses, the court will, on motion, order it to be quashed, or compel the prosecutor to elect on which charge he will proceed: but such election will not be required to be made when several counts are introduced solely for the purpose of meeting the evidence as it may transpire, the charges being substantially for the same offense.[2] The application, however, is addressed to the discretion of the court, and the determination thereupon is not the subject of review on appeal or writ of error.[3]

§ 88.—Statement of Ownership or Possession.—In any indictment for any felony or misdemeanor wherein it shall be requisite to state the ownership or possession of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint tenants, parceners, tenants in common or trustees, it shall be sufficient to name one of such persons and to state such property to belong to or be in possession of the person so named and another or others, as the case may be; and whenever, in any indictment for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatever, any partners, joint tenants, parceners, tenants in common or trustees, it shall be sufficient to describe them in the manner aforesaid.[4]

§ 89.—Amendment.—Whenever the misnomer of any defendant or defendants is pleaded in abatement to any indictment in any of the courts of this State having crimi-

[1] Manly *v.* State, 7 Md. 135.

[2] State *v.* Bell, 27 Md. 675; State *v.* McNally, 55 Ib. 559.

[3] State *v.* Bell, *supra*.

[4] Code, art. 27, sec. 285.

nal jurisdiction, it shall be lawful for the State's attorney prosecuting the same, or other person prosecuting for the State, on application to the court, to amend the said indictment by inserting, in the place of the name or names so erroneously set forth in the said indictment, the true name or names of such party or parties, as disclosed in the said plea of abatement; and it shall be the duty of the clerk of the court to endorse the amendment and to enter the said case upon the docket of the court, according to the true name or names of the party or parties so indicted.[1]

Whenever it shall appear, after a jury is sworn on any indictment, in any of the courts of this State having criminal jurisdiction, that the name or names of any person or persons other than the defendant or defendants has or have been erroneously set forth in said indictment, it shall be lawful for the State's attorney, or other person prosecuting for the State, on application to the court, to amend the said indictment according to the proof in the said cause; and it shall be the duty of the court in which such trial shall be had to proceed with the trial of the said indictment so amended, unless oath shall be made by the party or parties so charged that the said amendment or amendments has or have disclosed a fact or facts to him heretofore unknown, or that the immediate proceeding with the trial of the said indictment would tend to his prejudice, and, in such case, it shall be the duty of the court to discharge the jury sworn in the said case without a verdict, and to postpone the trial thereof for such reasonable time as the court shall determine, or, in case the said indictment is submitted to the court without the intervention of a jury, it shall be lawful for such amendment to be made as aforesaid and also to postpone the hearing of the said case for such time as it shall determine to be necessary.[2]

An indictment, being the finding of a grand jury upon oath, cannot, except in cases where the law has specially authorized such proceeding, and in matters of form which are not matters of substance, be amended by the court, without the concurrence of the grand inquest by whom it

[1] Code, art. 27, sec. 283; Parkinson *v.* State, 14 Md. 184.

[2] Ib., sec. 284; Parkinson *v.* State, *supra*.

was presented. In matters of form which are not matters of substance an amendment may be made by the court, or under its direction, at any time before the commencement of the trial.[1]

The case of Byers *v.* State[2] arose upon an indictment for bigamy. The grand jury returned the indictment, duly endorsed by the foreman, "true bill," on the 20th day of November, 1884. On the next following day, the foreman and the State's attorney came to the Court and called attention to the fact that the name of the party to whom the accused was alleged to have been married the second time had, through inadvertence, been omitted from the indictment, although a blank space had been left for that purpose, and made the request to correct this omission by inserting the name of "Jennie V. Miller." The Court, however, directed the foreman to go to the grand-jury room and make the matter known to his fellow jurors, so that the grand jurors might appear at the bar of the Court and make formal application for that purpose. This was done, and soon afterwards, on the same day, the grand jury appeared at the bar of the Court and through their foreman requested the return of the indictment for the purpose of filling up the blank therein with the name of Jennie V. Miller, and, upon this request, the Court directed the clerk to return the indictment to the foreman for the purpose aforesaid. The indictment was then placed in the hands of the foreman in the presence of his fellow jurors in open court. The grand jury then retired to their room and subsequently, on the same day, returned the same indictment again to the bar of the Court and delivered it to the Court, with the name of the said "Jennie V. Miller" inserted in the space left blank, and the Court received it and handed it to the clerk endorsed as aforesaid. These proceedings were sustained upon appeal. The Court of Appeals said:

"It is settled law everywhere that, when a grand jury is in session, they and their proceedings are under the general superintendence and control of the court, and that the court may, at any time, recommit to them an imperfect

[1] Hawthorn *v.* State, 56 Md. 530.

[2] 63 Md. 207.

finding.[1] In this State, the mode of returning presentments and bills of indictment by grand juries and filing them by the clerks is not regulated by statute, but is governed by uniform and long established usage and practice. According to this practice, the grand jury, when they are ready to make a return, come into open court with their foreman, their entrance being announced by a bailiff, and the clerk then calls them severally by their names and says, 'Gentlemen, have you agreed upon any presentments or bills of indictment?' The response being in the affirmative, they are then requested by the clerk 'to present them to the court,' and, upon the delivery of them, he says, 'Are you content the court shall amend matter of form, altering no matter of substance without your privity in these bills you have found?' To this they give their assent and then return to their room. When the papers have been thus delivered to the court, the judge examines them and, unless they are obviously erroneous, delivers them to the clerk, who thereupon files them and makes the proper entries on the criminal docket, and they then become part of the records of the court. If, however, the judge discovers an obvious mistake or error in any such paper, instead of delivering it to the clerk, he sends for the foreman of the grand jury, points out to him the error, informs him how it can be corrected, and delivers it to him, in order that it may be thus corrected. The foreman then takes it to the grand jury room, and there, in the presence and with the assent of his fellow jurors, makes the necessary correction, and, on a subsequent occasion, the paper thus amended is returned in the usual way. The preliminary examination thus given by the judge to a bill of indictment is usually confined to ascertaining whether it bears the proper endorsement of 'True Bill,' signed by the foreman. The body of the indictment is rarely looked at, because the judge assumes that this has been properly framed by the State's attorney, and such a defect as existed in the body of this indictment is a very unusual one. If the judge to whom it was delivered by the foreman of the grand jury

[1] Wharton Cr. Pl. & Prac. § 376; Archbold's Cr. Pr. & Pl. 211, n. 1; Low's Case, 4 Me. 439, 450.

had opened it and had discovered that the blanks had not been properly filled up, it would have been his duty, instead of handing it down to the clerk, to have returned it to the foreman for correction in the mode above indicated. The defect, however, was not discovered until the next day, and after the indictment had been delivered to the clerk and filed by him. In this state of case, no doubt, the more regular, formal and safe course would have been for the State's attorney to have had this indictment quashed and to have framed a new one and submitted it to the grand jury for their approval.[1] But this was not done, and the public and formal proceeding set out in the statement made by the learned judge of the court below was adopted in lieu thereof. The grand jury came into court while it was in open session and, through their foreman, made a public and formal request that the indictment should be returned to them for the purpose of properly filling up the blanks left in it, and the court thereupon gave a formal and express direction to the clerk to return the indictment to the foreman for this purpose. The indictment was then placed in the hands of the foreman, in the presence of his fellow jurors and in open court. The grand jury then retired, and, on the same day, returned the same bill, with the blanks properly filled up and bearing the same endorsement of 'True Bill,' signed by the foreman, and delivered it to the court, and the judge thereupon handed it to the clerk. All that was thus done was done in open court and with the court's express sanction and direction. It was the duty of the clerk to have entered these proceedings upon the minutes and as part of the record and proceedings of the court on the day on which they occurred, and if he failed to do so, it was competent for the court to have had the minutes of its proceedings corrected in this respect. What the grand jury thus did was, in our opinion, substantially the same thing as finding and returning a new indictment in the form in which the old indictment thus corrected stood. At all events, we discover in these proceedings no such defect as would justify the court in pronouncing the

[1] 1 Chitty Cr. L. 325; 2 Hale, 162; Bacon Abr., Indictment, D.

indictment thus treated and acted upon by the grand jury a nullity."

§ 90.—**Specific Offenses.**—The question of the sufficiency of the allegations in indictments for various offenses, both at common law and under statutes, will be further considered under titles relating to specific offenses.

CHAPTER VIII.

The Trial and its Incidents.

§ 91.—**Jurisdiction.**—If any person be feloniously stricken or poisoned in one county, and die of the same stroke or poison in another county, within one year thereafter, the offender shall be tried in the court within whose jurisdiction such county lies where the stroke or poison was given; and, in like manner, an accessory to murder or felony committed shall be tried by the court within whose jurisdiction such person became accessory.[1]

If a person be feloniously stricken or poisoned on the waters of Chesapeake Bay, and not within the body of any county, and, within one year thereafter, die of the same stroke or poison, within any county of this State; or, if any person be feloniously stricken or poisoned in any county of this State, and, within one year thereafter, die of the same stroke or poison, on the waters of the Chesapeake Bay, and not within the body of any county, the offender, his aiders, abettors and comforters, or any person accessory thereto, shall be tried in the court within whose jurisdiction such county lies where the death happened or the stroke or poison was given.[2]

Any person who shall commit any crime, offense or misdemeanor upon the waters of the Chesapeake Bay, within the limits of this State and without the body of any county thereof, and all aiders, abettors, comforters and accessories thereof and thereto, may be indicted and tried in any court of this State having jurisdiction of similar crimes, offenses and misdemeanors, of the county in which he may be arrested or into which he may be first brought.[3]

Any person who may commit any indictable offense on a steamboat or railroad train within the State of Maryland,

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[1] Code, art. 27. sec. 278.

[2] Ib., sec. 279.

[3] Ib., sec. 280.

may be presented, indicted, tried or convicted in any county or city from, to or through which the said boat or train may run, and, on arrest, be taken before, and, in case of bailable offenses, be held to bail by any justice of the peace in any such county or city; but such presentment, indictment and trial shall be in the same county and city in which such justice of the peace shall be.[1]

Criminal jurisdiction in the counties is vested in the Circuit Courts[2] and in Baltimore City in the Criminal Court of Baltimore.[3]

Where a person steals goods in another state and brings them into this, while he cannot be indicted and punished here for the crime committed in the former state, yet, as every asportation is a new larceny, he may be indicted and punished in this State upon proof that the goods were brought within the jurisdiction.[4] The fields of operations of conspiracies sometimes embrace various states, as the necessities of the conspirators require; yet the state in which all or any of them reside, and in which the conspiracy originated or was conducted, has ample jurisdiction to try and punish the offense; otherwise it would be committed with impunity.[5]

§ 92.—**Proceedings between Indictment and Trial.**—When the indictment has been filed, the prisoner, if not already in custody, is arrested and bailed, or committed for trial, and, if the charge be felony, he is *arraigned*. The form of procedure is as follows:

The prisoner having been placed at the bar—

Clerk. A. B., hold up your right hand. You stand indicted by the grand inquest of the State of Maryland, for the body of County, in manner following: (*reading the indictment*). What say you, are you guilty of the matter whereof you stand indicted or not guilty? The prisoner then says either "guilty" or "not guilty." If the latter, the clerk then asks,—

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[1] Code, art. 27, sec. 281.

[2] Const., art. 4, sec. 20; Code, art. 26, sec. 36; Biscoe *v.* State, 68 Md. 294.

[3] Const., art. 4, sec. 30; Code P. L. L., art. 4, sec. 181.

[4] Worthington *v.* State, 58 Md. 403.

[5] Bloomer *v.* State, 48 Md. 521, 535.

"How will you be tried?" The common answer is either "by the country" (or "jury"), or "by the court."[1]

The purpose of the arraignment is to identify the prisoner, inform him of the charge and obtain his plea to the indictment. If the prisoner has been arraigned and has pleaded to the indictment before the venue is changed, there is no need of a repetition of the form in the court to which the record is removed.[2] Holding up the right hand, as the prisoner is commonly directed to do when arraigned, is not essential.[3] Without pleading there can be no valid trial; and, if the prisoner, upon arraignment, refuses to plead, the court directs a plea of "not guilty" to be entered. In cases of misdemeanor, the plea of not guilty, or *non cul*, is entered by the clerk as a matter of course. If the defendant pleads "guilty," the court may proceed at once to sentence him; but such plea is received with great caution, and, if there be any room for doubt as to the party's comprehension of its import, or, perhaps, in any case where the offense is a grave one, the safe and proper procedure is for the court to direct the plea of not guilty to be entered.

If the indictment is defective, and the defendant desires to avail himself of the defect, he should *demur*. If the defendant does not choose to demur, but goes to trial on the plea of not guilty, and he is found guilty, judgment may be pronounced by the court, notwithstanding the indictment is defective, and, if he demurs and the demurrer is sustained and the indictment quashed, he may be indicted again.[4] Even after plea of not guilty the defendant may demur, the right to withdraw the plea for this purpose being absolute.[5] The effect of a demurrer is to admit the facts as stated in the indictment and the question then arises, whether such a state of facts constitutes an offense under our laws.[6] A demurrer, at any stage of the pleadings, opens for review all the previous pleadings, and, notwithstanding the de-

[1] 2 Ev. Harr. 286.

[2] 1 Bishop Cr. Proc. § 74; Price *v.* State, 8 G. 295, 305; Davis *v.* State, 39 Md. 354, 384.

[3] 1 Bishop Cr. Proc. § 732.

[4] Cochrane *v.* State, 6 Md. 400; State *v.* Hodges, 55 Ib. 127.

[5] Cochrane *v.* State, *supra*.

[6] State *v.* Fearson, 2 Md. 310.

fectiveness of the pleading demurred to, the court gives judgment against the party who committed the first error in pleading.[1]

The usual plea in criminal cases is the general issue plea of not guilty above referred to. The effect of this plea is to deny the whole charge, and the defendant may under it give his special defense in evidence, though the matter of fact be proved against him.[2] The defendant may also file special pleas in bar, such as the plea of limitations, *autrefois acquit*, *autrefoit convict* or *autrefoit attaint*, or he may plead to the jurisdiction of the court,[3] or in abatement.[4] When it is deemed expedient by counsel to file a number of special pleas, the respective pleadings should be contained on the same paper and filed at one time, and, if amendments are found to be necessary, the pleadings which require amendment should be prepared anew and filed and the original pleadings withdrawn from the case.[5] When the case is at issue, the next step in the proceedings is the trial, unless there should be a change of venue, or removal of the proceedings.

§ 93.—**Change of Venue.**—The parties to any cause may submit the same to the court for determination, without the aid of a jury; and, in all suits or actions at law, issues from the orphans' court or from any court sitting in equity, and in all cases of presentment or indictments for offenses which are or may be punishable by death, pending in any of the courts of law of this State having jurisdiction thereof, upon suggestion in writing under oath of either of the parties to said proceedings, that such party can not have a fair and impartial trial in the court in which the same may be pending, the said court shall order and direct the record of proceedings in such suit or action, issue, presentment or indictment to be transmitted to some other court having jurisdiction in such case for trial: but, in all other cases of presentment or indictment, pending in any of the courts of law in this State having jurisdiction thereof,

[1] Spielman *v.* State, 27 Md. 520.
[2] 1 Bishop Cr. Proc. § 743.
[3] Norwood *v.* State, 45 Md. 68; Neff *v.* State, 57 Ib. 385.
[4] Scarborough *v.* State, 55 Md. 345; Johns *v.* State, Ib. 350.
[5] Norwood *v.* State, *supra*.

in addition to the suggestion in writing of either of the parties to such presentment or indictment, that such party can not have a fair and impartial trial in the court in which the same may be pending, it shall be necessary for the party making such suggestion to make it satisfactorily appear to the court that such suggestion is true, or that there is reasonable ground for the same; and thereupon the said court shall order and direct the record of proceedings in such presentment or indictment to be transmitted to some other court having jurisdiction in such cases for trial; and such right of removal shall exist, upon suggestion, in cases when all the judges of said court may be disqualified, under the provisions of this Constitution, to sit in any case, and said court to which the record of proceedings in such suit or action, issue, presentment or indictment may be so transmitted shall hear and determine the same in like manner as if such suit or action, issue, presentment or indictment had been originally instituted therein; and the General Assembly shall make such modification of existing law as may be necessary to regulate and give force to this provision.[1]

When any suit or action, issues or petitions, presentment or indictment for offenses which are or may be punishable by death shall be removed, according to the provisions of the preceding section, it shall and may be lawful for the party at whose instance the said suit or action, issues or petition, presentment or indictment was not removed, if he shall think that justice can not be done him in said court to which said suit or action, issues or petition, presentment or indictment has been removed, to file an affidavit, as prescribed by the preceding section, in said court to which said removal is ordered, suggesting that he cannot have justice in such court, whereupon the said court shall remove the said cause, suit or action, issues or petition, presentment or indictment to such other court having jurisdiction in such cases as the said court shall think will best tend to justice between the parties to said suit or action, issues or petition, presentment or indictment. When any present-

[1] Const., art. 4, sec. 8; Code, art. 75, sec. 97; Biscoe *v.* State, 68 Md. 294; McMillan *v.* State, Ib. 307.

ment or indictment for offenses which are not or may not be punishable by death shall be ordered to be removed under the provisions of the preceding section, no removal shall be ordered by the court to which the same shall have been removed, upon the application of the party at whose instance such presentment or indictment was not removed, unless, in the exercise of its discretion, the said court shall be satisfied by proof that such removal is necessary for the purpose of a fair and impartial trial.[1]

It shall be in the power and discretion of the court, should they think it proper, to cause a special panel of forty-eight jurors to be selected by the sheriff from the community at large to try any cause or causes removed under the two preceding sections; and the court shall direct the clerk thereof to divide, by ballot, said number of jurors into two panels of petit jurors, and may take such order for the regulating the attendance of said panels as the said court shall see fit; and the said court may direct talesmen to be summoned in said cause or causes, whenever necessary.[2]

In all criminal cases removed as aforesaid, where the party to be tried therein is detained in jail, the party so detained shall not be removed until the first day of the session of the court to which said case shall be removed.[3]

Any of the said circuit courts to which any cause or causes may be removed under the preceding sections shall allow such compensation, not exceeding the sum of forty dollars in any one case, to the State's attorney, for his services in appearing to or trying said cause or causes, as they may deem just and proper, to be borne and paid by the county from which said cause or causes may be removed, or by the City of Baltimore, as the case may be.[4]

If it shall appear to any court to which any civil or criminal case has been removed, that the transcript of the record in said case is not a true transcript of the record or proceedings had in the court from which the said case has been

[1] Code, art. 75, sec. 98.
[2] Ib., sec. 99.
[3] Ib., sec. 100.
[4] Ib., sec. 101.

removed, it shall be the duty of the court to which the case has been removed forthwith to order and direct that the said imperfect transcript shall be delivered to the clerk of the court from which the same was sent; and it shall be the duty of said clerk receiving such transcript so to him returned to correct the same forthwith, noting at the end thereof the corrections so made, or to prepare a new transcript of the said record, which shall be correct in all its parts.[1]

The court to which any imperfect transcript is sent shall have power to order the delivery thereof to the clerk of the court from which the case was removed as often as may be necessary to the perfection of said transcript as a true copy of the record in the case; and the court to which such case is removed shall proceed with the trial thereof at as early a day as may be; and all recognizances and other proceedings had in the court to which the case is removed shall be as good and valid as if the transcript of the record originally transmitted had been correct in all its parts.[2]

Until the record in any cause has been actually transferred from the court passing the order of removal to the court to which it is removed, the court passing the order shall have power to strike out the order of removal on motion of the party applying for the same, and, when so stricken out, the cause shall proceed as if no motion for removal had been made, but the motion for removal shall not be renewed by the same party after the expiration of the term at which the order for removal was stricken out, provided that no such motion to strike out an order for removal shall be entertained, unless the same shall be made in time to admit of the trial of the cause at the same term of the court at which said order for removal was passed.[3]

The right of removal of a cause, under prescribed conditions, is a constitutional right, which can not be denied by the courts nor abridged by legislation, but the Legis-

[1] Code, art. 75, sec. 102.
[2] Ib., sec. 103.
[3] Ib., sec. 107.

lature may enlarge it.[1] The right, however, does not fall within the class of vested rights; it is but a remedy given to secure an impartial trial, wherefore, if the Constitution be amended in this regard after indictment, but before application for renewal, the application is governed by the law as existing at the time when it is made.[2] Subject to this qualification, the constitutional privilege has, in every respect, been construed liberally.[3] When there has been no *effectual* trial of a cause, a jury having been sworn and discharged, because of their inability to agree, the cause is still pending for trial, as much so, to all intents and purposes, as if a jury had never been sworn, and the right of removal obtains;[4] but ordinarily, when a trial has commenced, the jury having been sworn, the application for removal can not be entertained.[5]

Upon the receipt of the transcript of the record of the removed cause, the court to which the same is transmitted at once acquires jurisdiction, not only of the cause itself, but of the parties accused; and the fact that they are still detained in prison in the county from which the record was sent in no manner affects the jurisdiction thus acquired.[6] The sheriff of the county to which the case is removed is the proper person to take charge of the removal of the prisoner.[7]

§ 94.—**Mode of Trial.—Traverse before Court.**—Any person presented or indicted may, instead of traversing the same before a jury, traverse the same before the court, which shall thereupon try the law and the facts.[8] The effect of this is, to allow a party the privilege of electing

[1] Griffin *v.* Leslie, 20 Md. 15; Smith *v.* State, 44 Ib. 530; Hoyer *v.* Colton, 43 Ib. 421.

[2] Smith *v.* State, *supra;* Dulany *v.* State, 45 Md. 99.

[3] State *v.* Dashiell, 6 H. & J. 268; Price *v.* State, 8 G. 295; Jerry *v.* Townshend, 2 Md. 274; Griffin *v.* Leslie, *supra;* Price *v.* Nesbitt, 29 Ib. 263; Gardner *v.* State, 25 Ib. 146.

[4] Deford *v.* State, 30 Md. 179, 196.

[5] Price *v.* State, *supra;* Deford *v.* State, *supra;* Smith *v.* State, *supra;* McMillan *v.* State, 68 Md. 307.

[6] Schultze *v.* State, 43 Md. 295.

[7] Mayor *v.* County Commissioners, 61 Md. 326.

[8] Code, art. 27, sec. 282.

to be tried by the court instead of a jury, and, when such election is made, the court is substituted for the jury, and has the same duties and functions to perform in passing upon the guilt or innocence of the accused.[1]

§ 95.—Same Subject—Traverse before Jury.—In all civil cases called for trial in any court in which a jury shall be necessary, according to the Constitution and laws of this State, twenty persons from the panel of petit jurors shall be drawn by ballot by the clerk, under the direction of the court, and the names of the twenty persons shall be written upon two lists, and one of said lists forthwith delivered to the respective parties, or their counsel in the cause; and the said parties, or their counsel, may each strike out four persons from the said lists, and the remaining twelve persons shall thereupon be immediately empanelled and sworn as the petit jury in such cause.[2]

If the said parties, or their counsel, or either of them shall neglect or refuse to strike out from the said lists the number of persons directed in the preceding section, the court may direct the clerk to strike out from the list of the party so neglecting or refusing the number in said section directed, and the remaining twelve persons shall be empanelled and sworn as aforesaid; but this and the preceding section shall not take away the right of any person to challenge the array or polls of any panel returned, in the manner allowed by the laws of this State.[3]

The several courts of this State shall, at all times, have power to direct talesmen to be summoned to serve on juries, where, without such talesmen, there would not be twenty of the original panel, exclusive of the jury charged, from whom a jury can be formed, or may direct such tales to be summoned whenever, by challenging or otherwise, a sufficient number of jurors cannot be had to try the case, either civil or criminal.[4]

If the parties, or their counsel, agree, the drawing of a panel of twenty jurors in any cause may be dispensed with.[5]

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[1] League *v.* State, 36 Md. 257.

[2] Code, art. 51, sec. 13.

[3] Ib., sec. 14.

[4] Ib., sec. 15.

[5] Ib., sec. 16.

The provisions of the four preceding sections shall apply to all criminal cases where the right of peremptory challenge is not allowed, and the State's attorney for the county or city, or the attorney prosecuting for the State, shall strike for the State.[1]

Any alien, denizen or foreigner who may be indicted for any offense committed within this State shall be tried by a jury of the county in the same manner as the citizens thereof, and there shall be no challenge either to the array or the polls for the want of foreigners on the panel or jury that may be returned.[2]

The right of peremptory challenge shall be allowed to any person who shall be tried on presentment or indictment for any crime or misdemeanor the punishment whereof, by law, is death or confinement in the Penitentiary, and to the State, on trial of such indictment or presentment: but the accused shall not challenge more than twenty nor the State more than four jurors, without assigning cause.[3] In Baltimore City, in all criminal cases in which the person indicted has or may have the right of peremptory challenge, the State's attorney shall have the right to challenge peremptorily any number of jurors not exceeding five.[4]

No indictor shall be put in inquests upon deliverance of the indictees of felonies or trespass, if he be challenged for that same cause by him which is so indicted.[5]

To enable a party to a cause to secure the full enjoyment of the privilege of striking from a list of twenty jurors four of the jurors against whom no cause of challenge could be established, as contemplated by sections 13 and 14 of article 51 of the Code of Public General Laws, above quoted, the panel, before it is stricken from, should present twenty names beyond the reach of challenge, either as a principal cause or to the favor, and the parties have the right to have their causes of challenge heard and determined upon before the panel is drawn.[6]

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[1] Code, art. 51, sec. 17.

[2] Ib., sec. 18.

[3] Ib., sec. 19.

[4] Code P. L. L., art. 4, sec. 602.

[5] 25 E. 3, stat. 5, ch. 3; Alexander Br. Stat. 171.

[6] Lee *v.* Peter, 6 G. & J. 447.

Where several parties are jointly indicted and tried, the right to challenge the array or polls for favor or cause is one that each defendant is entitled to exercise for himself, independently of his co-defendants; but, in relation to the right of striking four persons from the list of twenty, all the defendants are considered but as *one party*, and can not claim the right to strike more than four jurors collectively.[1] But in cases where the punishment is death or confinement in the Penitentiary, the right of peremptory challenge is given to the accused by section 19 of the same article in different language, and such right of challenge where there are several defendants may fairly be held to be separate.[2]

Either party to a cause may challenge a juror for cause, whether he has or has not exercised his statutory right of peremptory challenge.[3]

The statutes relating to peremptory challenges do not prescribe the order in which challenges shall be made, or direct whether the State or the prisoner shall first exercise the right. It would seem, therefore, that the proceeding in this respect is left to the discretion of the Circuit Courts. It appears that the practice in the circuits has not been uniform. While in several of them the practice has been to require the State to challenge first, in the City of Baltimore and in the first and fourth circuits a different rule has prevailed.[4]

It has been the uniform practice of the courts of this State to proceed to make up and swear the panel from such jurors or talesmen as have been found attending the court, without waiting for or directing process against others who may have failed to attend, and whose names may have been first drawn, or who may have been first summoned. The accused has no special right to have any particular individual or individuals presented to be sworn as jurors rather than others equally competent. All that he has a right to demand is, that the persons presented to

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[1] Hamlin *v.* State, 67 Md. 333.

[2] State *v.* Reed, 47 N. H. 466; 1 Bishop Cr. Proc. § 1028.

[3] Edelen *v.* Gough, 8 G. 87.

[4] Turpin *v.* State, 55 Md. 462.

be sworn as his triers shall be good and lawful men, competent, under established rules of law, to be sworn in his case. The mere order of their being drawn or summoned cannot, in any way, affect their competency, nor does it operate to deprive the accused of any right that he may have in the organization of the jury. Therefore, it is no valid ground of objection by the traverser, that the persons drawn or summoned as jurors or talesmen were not called to the book in the order in which their names appeared in the list, or the order in which they may have been drawn or summoned.[1]

The usual and natural method of showing cause for challenge is to require the juror to declare the matter, under oath, on the *voir dire*.[2] The mere formation and expression of an opinion is not of itself a sufficient ground to exclude one from serving as a juror. The opinion which should exclude a juror must be a fixed and deliberate one, partaking of the nature of a prejudgment.[3] If a juror, after having been sworn, the full panel not being made up and the defendant given in their charge, informs the court that he has formed an opinion with regard to the guilt or innocence of the accused, it becomes the duty of the court to examine him upon oath, in order to ascertain whether the opinion so formed is such as to disqualify him from acting as a juror, and to discharge him from the panel, if it should appear that he is not qualified.[4]

§ 96.—**Oath of Jurors.**—In cases of misdemeanor the following oath is administered:—[5]

> You shall well and truly try the issue of this traverse between the State of Maryland and A. B., and a true verdict give according to your evidence. So help you God.

In cases of felony the jurors are sworn as follows:—[6]

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[1] Johns *v.* State, 55 Md. 350.

[2] 1 Bishop Cr. Proc. § 934.

[3] Waters *v.* State, 51 Md. 430; Zimmerman *v.* State, 56 Ib. 536; Johns *v.* State, *supra*.

[4] Zimmerman *v.* State, *supra*.

[5] 2 Ev. Harr. 283.

[6] Ib.

You shall well and truly try, and a true deliverance make between the State of Maryland and A. B., the prisoner at the bar, whom you shall have in charge, and a true verdict give according to your evidence. So help you God.

§ 97.—**Other Matters in Relation to Jury.**—After a prisoner has pleaded generally to an indictment having several counts, the jury may be sworn and charged upon one of the counts only, to the exclusion of the others.[1]

The authority of the court to discharge the jury after being impanelled and charged with the prisoner rests on the sound discretion of the court. It can rest nowhere else. It is merely an incidental matter arising in the progress of the trial in no way connected with the question before the jury of guilty or not guilty. It is an incidental matter depending upon circumstances appearing to the satisfaction of the court, as requiring it, in the proper administration of justice, to discharge the jury.[2]

A mistake in the name of a juror, in the selection of the panel, is no ground to arrest the judgment, where it appears that there was no mistake as to the identity of the person sworn as a juror.[3]

§ 98.—**The Trial.—When Said to Commence.**—The actual trial of a cause, at least in contemplation of the laws regulating removals and bills of exceptions, is said to commence when the panel of twelve jurors has been completed, by being duly sworn.[4]

§ 99.—**Prayers and Instructions.**—It is not error for the court, after the jury have retired to deliberate, to send a written response to the jury room, giving the opinion of the court upon a question submitted by the jury.[5] No court, however, can be required by either the counsel or jury to give instructions upon the law or the

[1] Burk *v.* State, 2 H. & J. 426.

[2] Hoffman *v.* State, 20 Md. 425.

[3] Munshower *v.* State, 56 Md. 514.

[4] Price *v.* State, 8 G. 295, 313; Smith *v.* State, 44 Md. 530; Dulany *v.* State, 45 Ib. 99; Pickett *v.* State, 58 Ib. XIII.

[5] Wheeler *v.* State, 42 Md. 563.

legal effect of the evidence; but it may, in its discretion, *advise* the jury in this regard.[1]

§ 100.—**Argument before the Jury.**—Whatever power the Constitution may have conferred upon juries in criminal cases, it has conferred none upon *counsel*. They are still officers of the court and under its proper control; they have no right and should not be permitted to argue against the opinion of the court on a question of law upon which the court has a right to express itself, in order to induce the jury to disregard it.[2]

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[1] Broll *v.* State, 45 Md. 356; Bloomer *v.* State, 48 Ib. 521, 539; Forwood *v.* State, 49 Ib. 531; Balto. & Yorktown Turnpike *v.* State, 63 Ib. 573; *ante*, § 32.

[2] Bell *v.* State, 57 Md. 108; Franklin *v.* State, 12 Ib. 236; Baker *v.* State, 2 H. & J. 5.

CHAPTER IX.

The Evidence.

§ 101.—**Competency of Witnesses.**—In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes and offenses, and in all proceedings in the nature of criminal proceedings, in any court of this State and before a justice of the peace or other officer acting judicially, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. In all criminal proceedings the husband or wife of the accused party shall be competent to testify; but, in no case, civil or criminal, shall any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage; and in suits, actions, bills or other proceedings instituted in consequence of adultery, or for the purpose of obtaining a divorce, or for damages for breach of promise of marriage, no verdict shall be permitted to be recovered, nor shall any judgment or decree be entered upon the testimony of the plaintiff alone, but, in all such cases, testimony in corroboration of that of the plaintiff shall be necessary.[1]

When the accused elects to become a witness on his own behalf, his testimony is open to observation by the attorney for the State and by the jury. His conduct on the witness stand, for example, his silence, when testifying, as to matters involved in the pending inquiry which are clearly within his knowledge, are circumstances that the jury has a right to consider in deciding upon the credit due to the witness, in connection with the other facts proven in the case, and they are, therefore, necessarily circumstances

[1] Code, art. 35, sec. 3.

Under a former statute the wife of the accused was held to be incompetent as a witness. Turpin *v.* State, 55 Md. 462.

upon which the State's attorney has a right to comment in addressing the jury. It is at the option of the accused to become a witness. Having elected to do so, he is made competent for all purposes in the case. If, by his testimony, he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power to give it. The reason for the presumption is alike in both cases. It arises from the known desire of parties to repel or explain accusatory evidence against them, if in their power, and the basis of the presumption is, that the case shows that it is in their power, if innocent. Hence, a failure tends to show an absence of innocence.[1]

A party accused, when examined as a witness, may be interrogated as to his own motives or intentions, when these are material.[2] Thus, a person on trial for an assault with intent to murder is competent to testify as to the purpose for which he procured the instrument with which he committed the assault.[3]

Accessories were formerly held incompetent to testify;[4] but, under the statute above quoted, this disability ceases.

Children are frequently produced as witnesses in criminal cases, and the question of their competency is an important one. There is no precise age within which they are absolutely excluded, on the presumption that they have not sufficient understanding.[5] If the infant be of sufficient years and discretion to know what occurs, to remember it, and to give an intelligible account of it, and, when examined, comprehends the danger and impiety of falsehood, he is a competent witness. The weight of his testimony is for the jury.[6] It may be regarded as settled, that, wherever there is intelligence enough to observe and to narrate,

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[1] Brashears *v.* State, 58 Md. 563.

[2] Wharton Cr. Ev., 9 ed., § 431.

[3] Fenwick *v.* State, 63 Md. 239.

[4] Davis *v.* State, 38 Md. 15.

[5] 1 Greenl. Ev. § 367; R. *v.* Brasier, 2 Leach, 183; S. C., 1 East P. C. 443; S. C., Bull. N. P. 293; Comm. *v.* Hutchinson, 10 Mass. 225; McGuire *v.* People, 44 Mich. 286.

[6] Kelly *v.* State, 75 Ala. 21.

there a child, having a due sense of the obligation of an oath, can be admitted to testify.[1] At the age of fourteen, every person is presumed to have common discretion and understanding; but, if the witness offered be below that age, inquiry is made by the judge, at his discretion, in order to ascertain the capacity of the witness.[2] The questions should be put in a simple fashion, adapted to the capacity of a child.[3] If the child, being a principal witness, appears not yet sufficiently instructed in the nature of an oath, the court may put off the trial that this may be done.[4] The sole reason for which infants of tender years may be excluded as witnesses is, that they do not, at the time when their testimony is offered, comprehend and realize the danger and impiety of falsehood; and, hence, the fact that an infant was of too tender years to be sworn at the time of the occurrence of the transaction about which he is afterwards called to testify does not render him incompetent, but is merely a circumstance that bears on the weight of his testimony.[5]

§ 102.—Number of Witnesses.—One witness is ordinarily sufficient for conviction. In cases of treason, by levying war against the State, or adhering to the enemies thereof, two witnesses, both of them to the same overt act are necessary,[6] and the mere unaided testimony of one witness is not sufficient to convict of perjury.[7] These are the only offenses requiring proof by more than one witness.

§ 103.—Accomplices.—An accomplice is defined to be "one who becomes a partaker with others in a crime, whether his guilt is in the same degree with theirs or not."[8] In all cases in which an accomplice is admitted to testify

[1] Wharton Cr. Ev. 9 ed., § 366.

But the dying declarations of a child four years of age have been rejected (R. *v.* Pike, 3 C. & P. 598); and Mr. Wharton assigns four years generally as a minimum (Cr. Ev., 9 ed., § 367.)

[2] 1 Greenl. Ev. § 367.

[3] Reg. *v.* Holmes, 2 F. & F. 788.

[4] 1 Greenl. Ev. § 367; Comm. *v.* Lynes, 142 Mass. 577.

[5] Kelly *v.* State, 75 Ala. 21.

[6] Code, art. 27, sec. 264. Cf. 2 Bishop Cr. Proc., § 1037.

[7] 2 Bishop Cr. Proc., §§ 927-932.

[8] 1 Ib., § 1159.

on behalf of the prosecution, while the jury may, if they deem fit, convict upon his testimony, yet it is the practice of both English and American courts, in the exercise of a sound discretion, to advise the jury not to convict the prisoner, unless the testimony of such accomplice be confirmed, not only as to the circumstances of the crime which he confesses to have committed, but also as to such circumstances as he testifies to as identifying the prisoner therewith; in other words, the corroborative proof must come from other sources, or third parties, of acts done by the prisoner connecting him with the accomplice and identifying the prisoner with the crime of the accomplice.[1]

§ 104.—Admissions and Confessions.—The term *admission* is usually applied to civil transactions and to those matters of fact in criminal cases that do not involve criminal intent; the term *confession* being generally restricted to acknowledgments of guilt.[2]

Declarations of the accused as to the crime with which he is charged, if voluntary, are always admissible against him;[3] but declarations of third parties are not ordinarily admissible.[4]

A confession is a person's declaration of his agency or participation in crime.[5] A confession made in court or before an examining magistrate is judicial: made out of court, whether to an official or non-official person, extra-judicial.[6]

Of the latter kind are the preliminary examinations, taken in writing by magistrates, pursuant to statutes obtaining in some jurisdictions, and the plea of "guilty" made in open court to an indictment. Either of these is sufficient to found a conviction upon, even if to be followed by sentence of death, they being deliberately made, under the deepest solemnities, with the advice of counsel and the protecting caution and oversight of the judge.[7] The

[1] 1 Bishop Cr. Proc., §§ 1169, 1170; 1 Greenl. Ev. § 380.
[2] 1 Greenl. Ev., § 170.
[3] Lamb *v.* State, 66 Md. 285.
[4] State *v.* Ridgely, 2 H. & McH. 120.
[5] People *v.* Parton, 49 Cal. 632.
[6] 1 Bishop Cr. Proc., § 1217.
[7] 1 Greenl. Ev., § 216.

plea of "guilty" in a capital case should, however, be received with extreme caution.[1] In cases of doubt as to the sanity or understanding of the accused, or his freedom from pressure or influence, the proper plan is for the court to refuse to receive the plea, but direct a plea of "not guilty" to be entered, so that the offense may be duly proven against him.

In cases of extra-judicial confessions the following doctrines prevail in this State. A confession is not admissible in evidence against the prisoner, unless it is freely and voluntarily made. When a prisoner has been told that he had better tell the truth, and these expressions are used by or in the presence of a person in authority, the evidence of the confession thus obtained should be rejected. Before permitting a witness to testify in regard to the confession, the court ought to ascertain, firstly, whether any inducement, at the time or prior thereto, had been held out to the prisoner, and, in the next place, whether he was influenced by such inducement in making the confession. The court may, it is true, rule out a confession, even after it has been admitted in evidence, if satisfied, in the subsequent progress of the case, that it was not a free and voluntary confession and may instruct the jury that it is not to be considered by them in determining the question as to the guilt or innocence of the prisoner; but, once in, it may have an influence more or less prejudicial against the prisoner. The preliminary question, therefore, as to its admissibility, is one which ought, in all cases, to be decided by the court, before it is permitted to go before the jury.[2]

The presumption of law is, that the influence of a threat or promise, once made, continues to operate; but this presumption may be rebutted by other proofs, showing that it had ceased to operate.[3]

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[1] Comm. *v.* Battis, 1 Mass. 95.

[2] Nicholson *v.* State, 38 Md. 140; Biscoe *v.* State, 67 Ib. 6.

[3] Peter *v.* State, 4 Sm. & M. 31; State *v.* Jones, 54 Mo. 478; Van Buren *v.* State, 24 Miss. 513; State *v.* Guild, 10 N. J. L. 163; Comm. *v.* Harman, 4 Pa. St. 269; Barnes *v.* State, 36 Tex. 356; Porter *v.* State, 55 Ala. 95.

Evidence given or statements made by a party under compulsion or order of court cannot afterwards be used against him in a criminal proceeding.[1]

A confession alone ought not to be sufficient evidence of the *corpus delicti*. There should be other proof that a crime has actually been committed; and the confession should only be allowed for the purpose of connecting the defendant with the offense.[2]

§ 105.—**Declarations—Res Gestae.**—Declarations or acts immediately following the commission of the act complained of are competent and proper evidence to explain such act. The rule applicable to the *res gestae* does not require that the circumstance proposed to be given in evidence should have occurred at the precise time when the principal fact happened; if it arose either at the time or so soon thereafter as to constitute a part of the transaction, then it serves to give color and definiteness to it.[3]

It is always competent for the State to prove that the party charged has previously made false or contradictory statements with respect to the circumstances attending the commission of the crime and the facts bearing upon him.[4]

The declarations of one conspirator are admissible in evidence against his co-conspirators.[5]

On a trial for murder the admissions or declarations of third persons that they killed the deceased are not evidence; and, even if such third persons, on being examined as witnesses, implicate the prisoner by their testimony, evidence of their declarations that they were guilty of the the offense is not admissible.[6]

Evidence offered by the defense on an indictment for murder, to the effect that the deceased, prior to the homicide, threatened the defendant's life is inadmissible, unless

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[1] Reg. *v.* Garbett, 1 Den. C. C. 236; U. S. *v.* Prescott, 2 Dill C. C. 405.

[2] Cooley Const. Lim. 315; 1 Greenl. Ev. § 217; 1 Bishop Cr. Proc. §§ 1058, 1059; Wharton Cr. Ev., 9 ed., §§ 632, 633.

[3] Handy *v.* Johnson, 5 Md. 450; Robinson *v.* State, 57 Ib. 14.

[4] Hays *v.* State, 40 Md. 633.

[5] Hays *v.* State, *supra;* Bloomer *v.* State, 48 Md. 521; Kernan *v.* State, 65 Ib. 253.

[6] Munshower *v.* State, 55 Md. 11.

proof be first given that there was an overt act of attack, and that the defendant, at the time of the collision, was in apparent imminent danger.[1]

§ 106.—**Dying Declarations.**—"Dying declarations are affirmations deriving their sanction, not from an oath, but from the solemn sense of impending death, and they do not admit of the opportunity for cross-examination. Yet, for the protection of human life, they are accepted as anomalous evidence in criminal prosecutions for homicide, when they proceeded from the very person alleged to have been unlawfully killed, to the single question of the circumstances of the killing and by whom; yet to no greater extent, and in no other causes, civil or criminal, whatever. Being admissible against defendants, they are, consequently, so also in their favor."[2] The same rules which determine the competency of a witness prevail also as to the declarant; and the declaration may be impeached or contradicted in the same manner as other testimony.[3]

§ 107.—**Expert Testimony.**—Whenever the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, or when it so far partakes of the nature of a science or trade as to require a previous habit, or experience, or study, in order to the attainment of a knowledge of it, the opinion of experts is admissible: but, if the matter of inquiry be not such as to require any peculiar habits or study in order to qualify a person to understand it, then such evidence is not admissible.[4]

Upon a trial for murder, the general appearance of wounds found upon the body of the person alleged to have been killed, the extent of the injury, whether they were inflicted by a sharp or a dull instrument, or came by accident, are proper subjects for the testimony of a medical expert.[5] A physician may likewise be called upon to express an opinion as to what would be the result of pressing violently with

[1] Turpin *v.* State, 55 Md. 462.
[2] 1 Bishop Cr. Proc., § 1207.
[3] Ib., § 1209.
[4] Davis *v.* State, 38 Md. 15.
[5] Ib.; Williams *v.* State, 64 Md. 384.

the foot upon the neck of a man lying on the ground.[1] Medical books, however, are not admissible in evidence, either for the purpose of sustaining or contradicting the opinion of a witness.[2] A medical witness in a trial for murder, who hears the physician who examined the body of the deceased fully describe the wounds on the head and the fracture of the skull, and hears several witnesses describe the construction and condition of a sink in which the body was found, is competent to testify whether such wounds and fracture were likely to have been occasioned by accidentally falling into the sink, and the fact that he does not hear the whole cross-examination of the physician who described the wounds and fracture on the head does not affect his competency.[3] But, while an expert may gives his opinion upon facts assumed to have been established, he will not be allowed to state his opinion upon the conclusions and inferences of other witnesses.[4]

§ 108.—**Almanacs.**—Courts have received as evidence weather reports, reports of the state of the markets, price currents and insurance tables, tending to show the probable duration of human life, and, upon a trial for murder, it was held competent for the State to offer in evidence an almanac, for the purpose of proving at what hour the moon rose on a certain night.[5]

§ 109.—**Relevancy.**—The evidence must be relevant to the issue.[6] On a trial for murder, evidence of what occurred at a saloon, half a square from another saloon where the homicide occurred, and only four or five minutes before the killing is admissible to show the movements and general conduct of the prisoner immediately preceding the killing. What was said and done by others at the same time and in company with the prisoner was held to be admissible upon such charge.[7]

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[1] Williams *v.* State, 64 Md. 384.

[2] Davis *v.* State, 38 Md. 15.

[3] Davis *v.* State, *supra.*

[4] Williams *v.* State, *supra.*

[5] Munshower *v.* State, 55 Md. 11.

[6] Hays *v.* State, 40 Md. 633; Chelton *v.* State, 45 Ib. 564; Munshower *v.* State, 55 Ib. 11; Turpin *v.* State, Ib. 462; Donovan *v.* State, 64 Ib. 365.

[7] Kernan *v.* State, 65 Md. 253.

Proof that a man has violated the law in particular instances cannot be rebutted by proof that he did not violate it in other instances where he had the opportunity and temptation to do so.[1] But evidence of other acts than that charged may, under certain circumstances, be admitted for the purpose of proving guilty knowledge on the part of the accused. Thus, where a party is indicted for uttering a forged instrument, knowing the same to be forged, it is competent for the State, in order to prove the *scienter*, to show, that, at or about the time of the forgery charged in the indictment, the defendant held and uttered similar forged instruments;[2] and, upon an indictment for attempting to procure a miscarriage and an abortion, evidence of an attempt by the defendant, made subsequent to the act charged, to accomplish the same purpose by a different means is admissible, in order to prove the purpose in the former attempt.[3] Upon a trial for murder, the State may prove, as bearing upon the question of *malice*, that, on the day before the fatal assault and several days prior thereto, the accused had beaten and otherwise maltreated the deceased.[4] Upon the trial of an indictment for the sale of liquor without a license, where it appeared that the traverser had kept cigarettes for sale and ostensibly given away a drink of whiskey with the purchase of cigarettes, testimony was allowed to be given on the part of the State, in order to prove the real nature of the transaction, that, on other occasions than that stated in the indictment and about the same time, cigarettes had been sold by the traverser at a sum disproportioned to their value, and that, with each purchase, a drink of liquor was ostensibly given away by the traverser.[5]

A defendant, upon a trial for burglary, in order to prove that he entered the dwelling-house in question with intent, not to commit a felony, but to commit adultery with a woman in the same, may offer in evidence facts tending to

[1] Archer *v.* State, 45 Md. 33.

[2] Bishop *v.* State, 55 Md. 138; Bell *v.* State, 57 Ib. 108.

[3] Lamb *v.* State, 66 Md. 285.

[4] Williams *v.* State, 64 Md. 384.

[5] Archer *v.* State, *supra*.

show specific illicit relations between the two parties.[1] Wherever a specific intent is an essential ingredient of the offense charged, the defendant may testify as to the same:[2] but this rule does not apply where the act charged is prohibited unconditionally.[3]

§ 110.—**Allegations and Proof.—Surplusage.**—The rule strictly confining the evidence to the point in issue and requiring the allegations and proof to correspond is more rigidly applied in criminal than in civil cases.[4] Mere surplusage, however need not be proved.[5] Language merely formal and allegations that are wholly unnecessary may be rejected upon the trial of an indictment, nor is it absolutely necessary, in every instance, to prove the offense to the whole extent laid;[6] but an allegation in an indictment which describes, defines, qualifies or limits a matter material to be charged is a descriptive averment and must be proved as laid, even though such particular description was unnecessary.[7] "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage."[8]

§ 111.—**Proof of Time.—Statute of Limitations.**—In general, the proof of the offense need not correspond in day of the month and year with the allegation.[9] Any day, before or after, within the statute of limitations and before the bringing of the prosecution will suffice.[10] But, when time enters into the nature of the offense, it must be laid and proved with particularity:[11] and, when time is alleged

[1] Robinson *v.* State, 53 Md. 151.

[2] Fenwick *v.* State, 63 Md. 239.

[3] Carroll *v.* State, 63 Md. 551.

[4] 3 Russell Cr. 279; Stewart *v.* State, 62 Md. 412.

[5] U. S. *v.* Vickery, 1 H. & J. 427.

[6] Comm. *v.* Griffin, 21 Pick. 523.

[7] Wharton Cr. Ev., 9 ed., § 146; 1 Bishop Cr. Proc., §§ 485-487.

[8] Per Story, J., U. S. *v.* Howard, 3 Sumn. 12, 15. Cf. State *v.* Jackson, 30 Me. 29; Turner *v.* State, 3 Heisk. 452; People *v.* Jones, 5 Laus. 340; R. *v.* Deeley, 1 Moody, 303.

[9] 1 Bishop Cr. Proc., § 400.

[10] Ib.; Capritz *v.* State, 1 Md. 569; Clayton *v.* State, 60 Ib. 272.

[11] 1 Bishop Cr. Proc., § 401.

in a form descriptive of the offense, it must be proved as laid.[1]

In this State it is provided by statute, that no prosecution or suit shall be commenced for any fine, penalty or forfeiture, or any misdemeanor, except those punished by confinement in the Penitentiary, unless within one year from the time of the offense committed,[2] and that all actions or prosecutions for blasphemy and Sabbath-breaking, or drunkenness, shall be made within one month after the fact.[3] The statute of limitations in criminal cases is a rule of *evidence*, and the proof must affirmatively show the offense to have been committed within the period limited.[4]

§ 112.—**Sufficiency of Evidence.**—In criminal cases the jury may find the prisoner or accused guilty only when convinced, by the evidence, of his guilt beyond a reasonable doubt.[5] This doctrine extends to all classes of offenses,[6] but applies only to the *corpus delicti*[7] and the question of the identity or criminal agency of the accused,[8] not to collateral matters.[9] The law, in all cases, raises a presumption of innocence in favor of the accused, and this presumption can only be overcome by such proof as shall be inconsistent with the hypothesis of his innocence and exclude every

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[1] U. S. *v.* McNeal, 1 Gall. 387; Comm. *v.* Monahan, 9 Gray. 119.

[2] Code. art. 57. sec. 10.

[3] Ib., sec. 11.

[4] R. *v.* Phillips, R. & R. 369; U. S *v.* Smith. 4 Day. 121, 128; Comm. *v.* Ruffner. 28 Pa. St. 259; World *v.* State, 50 Md. 49.

A *scire facias* issued in the name of the State to secure the forfeiture of the charter of a corporation is not a suit for a fine or forfeiture within the meaning of this statute.—Wash. & Balto. Turnpike Road *v.* State. 19 Md. 239, 294. The sale of liquor on Sunday is not Sabbath-breaking within the meaning of section 11, above quoted. but prosecutions for this offense come within section 10, above quoted, and may be brought within one year from the date of the offense.—State *v.* Popp, 45 Md. 432; Seim *v.* State, 55 Ib. 566. Prosecutions for bastardy must be commenced within one year, from the date of the birth of the child.—Bake *v.* State, 21 Md. 422; Neff *v.* State, 57 Ib. 385.

[5] Snyder *v.* State, 59 Ind. 105; Bressler *v.* People, 117 Ill. 424.

[6] 1 Bishop Cr. Proc , ⅞ 1094; Norwood *v.* State. 45 Md. 68, 75.

[7] Norwood *v.* State, *supra.*

[8] 1 Bishop Cr. Proc., ⅞ 1060.

[9] Norwood *v.* State, *supra.*

reasonable doubt thereof.[1] In a leading case,[2] the jury were instructed, "that the government is bound to prove the defendant guilty beyond all reasonable doubt and to a moral certainty; and, unless the evidence in the case satisfies them to that extent, they ought to acquit the defendant." It is said by high authority,[3] that there are no words plainer than "reasonable doubt," and none so exact to the idea meant, and that the books do not contain one affirmative definition which can safely be pronounced both helpful and accurate. The definition oftenest quoted, perhaps, is that which states that a reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition, that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[4]

§ 113.—Prosecutions for Second Offenses.—If a party be proceeded against for a second or third offense under a statute, and the sentence prescribed be different from the first and severer, by reason of its being such repeated offense, the fact thus relied on must be averred in the indictment, and the averment of prior conviction can only be sustained by the production of the record, or a duly certified copy thereof, sustained by proof of the identity of the person on trial with the one described in the former indictment.[5]

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[1] People *v.* Padilla, 42 Cal. 535; Beaver *v.* State, 58 Ind. 530; Block *v.* State, 1 Tex. App. 368.

[2] Comm. *v.* Goodwin, 14 Gray, 55.

[3] 1 Bishop Cr. Proc., § 1094.

[4] Comm. *v.* Webster, 5 Cush. 296, 310. Cf. Miles *v.* U. S., 103 U. S. 304, 311.

[5] Maguire *v.* State, 47 Md. 485.

CHAPTER X.

The Verdict and Subsequent Proceedings.

§ 114.—**The Verdict.—General Doctrine.**—The verdict is the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial.[1]

Unanimity is indispensable to the sufficiency of the verdict.[2] It is also necessary that the verdict should be upon *all the matters involved* in the issue, and, where there are several issues, upon *all the issues*. Where an indictment containing two counts is submitted to the jury upon the plea of not guilty, it is their duty to find both issues in their verdict: and, if the jury find the prisoner guilty upon one issue, as upon the inferior offense, and do not find the other issue, the verdict should be set aside.[3] Where issue is joined upon an indictment involving *different grades of the same offense*, and the party is acquitted of the higher and convicted of the lower grade, the verdict must find specifically not guilty of the higher and guilty of the inferior charge.[4] Where the indictment contains *several counts*, a general verdict of guilty is sufficient.[5] Upon such a verdict, judgment may be rendered, if there be one good count.[6] The general rule by which the sufficiency of a verdict is to be determined is, to ascertain *whether it covers the indictment.*[7]

§ 115.—**Verdicts in Cases of Homicide.**—It is provided by statute, that the jury before whom any person indicted for murder shall be tried shall, if they find such person

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[1] Ford *v.* State, 12 Md. 514, 549.

[2] Ib

[3] State *v.* Sutton, 4 G. 494.

[4] State *v.* Flannigan, 6 Md. 167.

[5] Manly *v.* State, 7 Md. 135; Stevens *v.* State, 66 Ib. 202.

[6] Gibson *v.* State, 54 Md. 447.

[7] Weighorst *v.* State, 7 Md. 442.

guilty thereof, ascertain in their verdict, whether it be murder in the first or second degree; but, if such person be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime and to give sentence accordingly.[1] A verdict of "guilty" upon an indictment for murder, under this statute, is a nullity;[2] but a verdict of "guilty of murder in the second degree," without negativing guilt in the first degree, is sufficient.[3] A verdict of "guilty of manslaughter," however, without saying not guilty of murder, is erroneous.[4]

§ 116.—**Verdicts in Second Offense Cases.**—It has been held in this State, that, in order to justify a sentence as for a second offense, it must appear by the verdict that the jury have found the party guilty of a second offense, not guilty generally.[5]

§ 117.—**Rendition of the Verdict.**—When the jurors have signified that they are prepared to render their verdict, they are brought into court and asked by the clerk, whether they have agreed upon their verdict and who should say for them, to which they respond, that they have and that their foreman should say for them. Whereupon the clerk tells the prisoner, if the charge be felony, not in cases of misdemeanor,[6] to hold up his right hand, and requests the jurors to look upon him[7] and say whether he is guilty or not guilty. The answer being given, he writes the word "guilty," or "not guilty," as may be, upon the docket, and again addresses the jury: "Hearken to your verdict as the court hath recorded it; you say, that A. B. is [not] guilty of the felony (or misdemeanor) whereof he stands indicted, and so say you all."[8] To make sure that the verdict is unanimous, the jurors may be *polled*, i. e., examined by poll, each juror being required separately to declare his verdict. This right, carrying with it the right in each

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[1] Code, art. 27, sec. 215.

[2] Ford *v.* State, 12 Md. 514; Williams *v.* State, 60 Ib. 402.

[3] Weighorst *v.* State, 7 Md. 442.

[4] State *v.* Flannigan, 6 Md. 167.

[5] Maguire *v.* State, 47 Md. 485, 498.

[6] 1 Bishop Cr. Proc., § 1001.

[7] In cases of misdemeanor this is omitted. Ib.

[8] Ib.; Ford *v.* State, *supra*.

juror to dissent when questioned, belongs to either party, and the direction may be given by the court of its own motion.[1]

§ 118.—**Verdicts where Defense is Insanity.**—When any person indicted for a crime or misdemeanor shall allege insanity or lunacy in his defense, the jury impanelled to try such person shall find by their verdict whether such person was, at the time of the commission of the offense, or still is insane, lunatic or otherwise.[2] If the jury find by their verdict that such person was, at the time of committing the offense, and then is insane or lunatic, the court before which trial was had shall cause such person to be sent to the almshouse of the county or city in which such person resided at the time of the commission of such act, or to a hospital, or some other place, better suited, in the judgment of the court, to the condition of such prisoner, there to be confined until he shall have recovered his reason and be discharged by due course of law.[3] Where any person, arrested for improper or disorderly conduct, or charged with any crime, offense or misdemeanor, against whom no indictment has been found, shall appear to the court, or be alleged to be a lunatic or insane, the court shall cause a jury of twelve good and lawful men to be impanelled forthwith, and shall charge said jury to inquire, whether such person was, at the time of the commission of the act complained of, insane or lunatic, and still is so; and, if such jury shall find that such person was, at the time of the commission of such act, insane or lunatic, and still is so, the court shall direct such person to be confined as directed in the preceding section, at the expense of the county or city, as the case may be, until he shall have recovered and be discharged by due course of law.[4] If, during the recess of the Circuit Court for any county, or the Criminal Court of Baltimore, any person appearing or alleged to be insane or lunatic shall be arrested and charged with any crime or misdemeanor before the judge thereof, the

[1] 1 Bishop Cr. Proc. § 1003; Ford *v.* State, 12 Md. 514; Williams *v.* State, 60 Md. 402; Biscoe *v.* State, 68 Ib. 294.

[2] Code, art. 59, sec. 4.

[3] Ib., sec. 5.

[4] Ib., sec. 6.

said judge shall issue an order to the sheriff of the county or city where said offense has been committed, requiring him forthwith to summon a jury of twelve good and lawful men, and to charge such jury to inquire, whether such person was lunatic or insane at the time such offense was committed, and still is so; and, if the jury find that the party charged was insane or lunatic at the time of the commission of the offense, and still is so, the judge shall commit such person as directed in the preceding section.[1] The provisions of the preceding sections shall apply to the case of any person who may be arrested on any process issued by any court or judge of this State, founded on oath, requiring security to keep the peace, and who shall fail to give such security.[2] If any insane or lunatic person, mentioned in the three preceding sections, shall be possessed of real or personal property, the annual profit or rent of which shall be adequate to his reasonable support in any hospital or asylum for the reception of insane or lunatic persons, the court or judge shall appoint a trustee for the estate of said lunatic or insane person, and shall require the said trustee to give bond to the State of Maryland, in such penalty and with such security as the court or judge shall approve, with condition that he will cause the said lunatic or insane person to be confined and supported in some hospital or insane asylum until such person shall have recovered his reason, and that he will faithfully administer and fully account for all such estate, income and effects of said lunatic or insane person as shall come to his possession or be under his care or direction.[3]

§ 119.—**Effect of Verdict.**—If the defendant be acquitted, even though the acquittal be erroneous, he can not be tried again,[4] but, if the judgment be reversed, the party may be indicted *de novo*.[5] If a defendant goes to trial upon a *defective indictment*, without taking advantage of the defect in the mode pointed out by law, a verdict of guilty is conclusive against him; there is no mistrial, and

[1] Code, art. 59, sec. 7.
[2] Ib., sec. 8.
[3] Ib., sec. 9.
[4] Shields *v.* State, 49 Md. 301.
[5] State *v.* Buchanan, 5 H. & J. 317, 329.

he is not liable to be tried again for the same offense.[1] The *quashing* of an indictment does not operate as an acquittal or prevent the defendant from being again indicted.[2] Where the *same facts* that were given in evidence upon a trial which resulted in an acquittal become material to the proof of a different charge, the acquittal does not operate to render evidence of such facts inadmissible.[3] In cases of prosecutions for *conspiracy*, when two persons only are charged, the acquittal of one is the acquittal of both.[4]

§ 120.—**Mistrial.**—When there has been no valid and sufficient verdict, there is said to be a mistrial, and the defendant may be tried again.[5] Likewise, if the indictment be quashed for defect of form, the defendant may be re-indicted and re-tried,[6] and where a judgment is reversed for error in the rulings of the court, the trial is a mistrial and does not relieve the defendant from further liability.[7] It is only when there has been a final verdict, either of acquittal or conviction, that the defendant can not be a second time place in jeopardy for the same offense.[8] Without a verdict arrived at by the jury, or the court, if the defendant dispenses with a jury, there can be neither an acquittal nor a conviction.[9] Hence, when the court is equally divided, there is said to be a mistrial, in the same manner as if a jury had failed to agree.[10] When the defendant has been regularly convicted and the judgment is afterwards reversed for error in the *sentence*, he can not, at common law, be re-tried. Such a trial is not a mistrial.[11]

§ 121.—**Arrest of Judgment.**—A motion in arrest of judgment must be founded upon some error apparent upon

[1] State *v.* Reed, 12 Md. 263.
[2] Neff *v.* State, 57 Md. 385.
[3] Bell *v.* State, 57 Md. 108.
[4] Bloomer *v.* State, 48 Md. 521, 536.
[5] Ford *v.* State, 12 Md. 514, 549; State *v.* Sutton, 4 G. 494; State *v.* Williams, 5 Md. 82.
[6] Cochrane *v.* State, 6 Md. 400.
[7] Cochrane *v.* State, *supra;* Kearney *v.* State, 48 Md. 16, 27.
[8] Hoffman *v.* State, 20 Md. 425.
[9] League *v.* State, 36 Md. 257.
[10] League *v.* State, *supra.*
[11] McDonald *v.* State, 45 Md. 90.

the face of the record; extrinsic or foreign matters not so appearing are wholly unavailable for this purpose.[1]

After a general verdict of guilty upon an indictment containing several counts, if it appear that there is one good count, judgment, at common law, will not be set aside or arrested;[2] and, by statute, judgment can not be arrested for defects which could be reached by demurrer.[3]

§ 122.—**Judgment.—Sentence.**—Judgments in criminal cases must be in strict conformity with the law. "Nothing is more important than that the rights of the citizen should be well defined and the power of justice exactly declared by the law, whose requirements ought to be strictly and rigidly observed."[4] But, if a lighter burden is imposed by the sentence on a convict than the law authorizes, the prisoner ought not to have the privilege of a reversal and discharge on that account.[5]

Where the penalty is a *fine*, the party must be fined in the name of the State, though other persons are ultimately entitled to the money.[6]

In order to justify a sentence as for a *second offense*, it has been held, that it must appear by the verdict that the jury have specifically found the party guilty of such second offense, and, if the verdict be guilty generally, without anything more, the judgment to be entered on it can only be as for a first offense.[7]

The punishment must be in accordance with the law as it stands at the time of *final judgment*. A party can not be convicted after the law under which he may be prosecuted has been repealed, though the offense may have been committed before the repeal, and the same principle applies

[1] Archer *v.* State, 45 Md. 447; Green *v.* State, 59 Ib. 123; Byers *v.* State, 63 Ib. 207.

[2] Manly *v.* State, 7 Md. 135; Gibson *v.* State, 54 Ib. 447.

[3] Code, art. 27, sec. 286; Cochrane *v.* State, 6 Md. 400.

[4] Watkins *v.* State, 14 Md. 412, 423; Cornish *v.* State, 15 Ib. 208; McDonald *v.* State, 45 Ib. 90.

[5] Isaacs *v.* State, 23 Md. 410. Cf. U. S. *v.* Vickery, 1 H. & J. 427.

[6] Rawlings *v.* State, 2 Md. 201, 216.

[7] Maguire *v.* State, 47 Md. 485, 498.

where the law is repealed or expires pending an appeal or writ of error from the judgment of an inferior court.[1]

A *reversal* of the judgment, at common law, operates to discharge the defendant from punishment.[2]

Courts, in both civil and criminal cases, *retain power* over their judgments and orders during the term at which they are entered or made, and may, during that time, set them aside, or change or modify them, as circumstances may require.[3]

§ 123. — Same Subject — Statutory Provisions. — All claims to dispensation from punishment by benefit of clergy are forever abolished; and every person convicted of any felony heretofore deemed clergyable shall be sentenced to undergo a confinement in the Penitentiary for any time not less than eighteen months nor more than five years, except in those cases where some other specific penalty is prescribed by this Code. And every person who shall be convicted of any felony heretofore excluded from the benefit of clergy shall be sentenced to undergo a confinement in the Penitentiary for not less than five nor more than twenty years.[4]

[1] Keller *v.* State, 12 Md. 322; Mayor *v.* State, 30 Ib. 112; Griffith *v.* State, 33 Ib. XI; Proud *v.* State, Ib. XII; Smith *v.* State, 45 Ib. 49. Cf. State *v.* Tibbs, 3 H & McH. 83.

[2] Black *v.* State, 2 Md. 376; Cochrane *v.* State, 6 Ib. 400; Keller *v.* State, 12 Ib. 322; Watkins *v.* State, 14 Ib. 412.

[3] Seth *v.* Chamberlaine, 41 Md. 186, 194.

[4] Code, art. 27, sec. 292.

Benefit of clergy consisted in being excused from capital punishment. The number of felonies at common law was but small, consisting, according to Coke, of seven, to wit: homicide, rape, burglary, arson, robbery, theft, mayhem. All these, except petty larceny (stealing things worth less than twelvepence) and mayhem, were punished with death and were originally subject to the privilege of clergy. It is said that high treason against the king was never clergyable: and there were also two forms of felony which were excluded from the benefit of clergy at common law, namely, "*insidiatio viarum et depopulatio agrorum*," or highway robbery and wilful burning of houses. The above statute provision, in nearly its present form, is a codification of the Act of 1809, c. 13, sec. 11. Prior to that time benefit of clergy prevailed, regulated, however, by the Act of 1737, c. 2. See, in general, 1 Stephen Hist. Cr. L. pp. 459–472.

If any offender, on conviction, may be sentenced to suffer death, the court before whom such offender shall be tried and convicted shall sentence him to suffer death by hanging by the neck.[1]

Where a case has been removed for trial, and the party shall be sentenced to be hung, the court shall remand him to the place where the indictment was found, where the sentence shall be executed, as if passed in that place.[2]

It shall be the duty of the courts of this State, in sentencing convicts to the Penitentiary, to sentence them for such a period as will expire between the first day of April and the last day of August, if they shall deem it expedient to do so.[3]

No conviction or attainder shall work corruption of blood or forfeiture of estate; the estate of such persons as shall destroy their own lives shall descend or vest as in case of natural death; if any person be killed by casualty, there shall be no forfeiture in consequence thereof; an approver shall never be admitted, in any case whatsoever; and a sentence of death shall not be executed in less than twenty days after judgment.[4]

The real and personal estate of the person convicted and sentenced to undergo a confinement in the Penitentiary, or to be executed, shall, after paying retribution and reparation to the party injured, be liable to the discharge of the expenses incurred by the State in the apprehension, prosecution, conviction, and removal of such criminal; and, in order to ascertain the amount thereof, the court before whom such offender is convicted shall cause its clerk to certify to the warden of the Penitentiary the amount of reparation adjudged and all costs and charges incurred in the prosecution and conviction of such offender, which the warden shall enter in books to be by him kept for that purpose.[5]

In all cases where restitution or reparation is adjudged to be made to the party injured, and immediate restitution

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[1] Code, art. 27, sec. 293.
[2] Ib., sec. 294.
[3] Ib., sec. 299.
[4] Ib., sec. 301.
[5] Ib., sec. 302.

or reparation is not fully made, the court before whom the offender is convicted shall, at the instance of the party injured, issue execution against the property of such convicted person, in the name of the person injured, for the value of the property taken, or so much thereof as is not restored, such value to be estimated by the said court; but nothing herein contained shall be construed to deprive the party injured from having and maintaining a civil action against such offender, either before or after conviction, or against any other person, for the recovery of the money received or property taken, or the value thereof.[1]

If any person who has removed his trial shall be convicted of any offense punishable by fine or imprisonment, the court shall, if the sentence be imprisonment, sentence him to confinement in the jail of the county or city from which such removal took place; and it shall be the duty of the sheriff of the county or city where such conviction may be had, to place the person convicted in the custody of the sheriff of the county or city in which the indictment was found, together with a certified copy of the docket entries in the case.[2]

§ 124.—**Convict Infants.**—When any infant under the age of fifteen years shall be convicted of any offense other than those mentioned in the succeeding section, the court may suspend the sentence upon such convicted infant and bind him or her to some person residing in or out of this State, or may procure other employment for such infant, in or out of this State, and shall have power to compel such infant to comply with the terms of its judgment; but such infant shall not be bound to service in the county or city where the conviction was had, nor for a term exceeding beyond the age of eighteen years in females and twenty-one in males.[3]

All infants over twelve and under the age of fifteen years, who may be convicted of mayhem, murder in the second degree, manslaughter, assault with intent to com-

[1] Code, art. 27, sec. 303. See, also, Ib., § 83: Isaacs *v.* State, 23 Md. 410.

[2] Ib., sec. 304.

[3] Ib., sec. 295.

mit murder or mayhem, or of setting fire to any building, tenement or property, the setting fire to which is punishable by confinement in the Penitentiary in the case of adults, shall be sentenced to the Penitentiary for the said crime in the same manner as if they were of full age, or, in the discretion of the court, may be confined in the House of Refuge, or St. Mary's Industrial School, or House of Reformation [and Instruction for Colored Children.][1]

Any court in this State having criminal jurisdiction may bind out to the managers of any house of refuge or other institution under police regulations, within the limits of said State, all infants over twelve and under the age of fifteen years, until they shall arrive at an age of not less than eighteen nor more than twenty-one years, who shall be convicted of any offense punishable in adults by confinement in the Penitentiary, other than those specified in the preceding section.[2]

It shall be the duty of every court having criminal jurisdiction to examine into the character of all infants convicted of offenses for which they may be bound as apprentices under the preceding section and to exercise a sound discretion in determining whether the infant so convicted should be bound out in accordance with existing laws, or should be sentenced to the Penitentiary, in the same manner with adults convicted of like crimes, and to bind out or sentence such infants accordingly.[3]

Whenever any colored minor under the age of sixteen years shall be convicted before any court or justice of the peace of any felony or other offense against any law or laws of this State, the judge of said court or said justice, in his discretion and with reference to the character of said institution as a place of reform, and not of punishment, may order said minor so convicted to be removed to and confined in the House of Reformation [and Instruction]: provided, that, in all cases, no transfer of any such minor shall be made until due notice has been given to the superintendent of said House of Reformation, and an answer

[1] Code, art. 27, sec. 296.
[2] Ib., sec. 297.
[3] Ib., sec. 298.

received from him, that there is room for the reception of such delinquent.[1]

Whenever any white male minor under the age of sixteen years shall be convicted of felony in any court of this State, the judge of said court, in his discretion and with reference to the character of the House of Refuge as a place of reform, and not of punishment, may order said minor so convicted to be removed to and confined in the said House of Refuge; provided, that, in all cases, no such transfer of any such minor from the counties shall be made, until due notice has been given to the superintendent of said House of Refuge, and an answer received from him, that there is room in the House of Refuge for the reception of such delinquent.[2]

Whenever any colored female under the age of eighteen years shall be convicted in any of the courts of this State of any offense, or of vagrancy, the judge of said court, in his discretion and with reference to the character of the Industrial Home for Colored Girls as a place of reform, and not of punishment, may order the minor so convicted to be removed to and confined in the said Industrial Home for Colored Girls.[3]

§ 125.—**Sentence to Maryland House of Correction.**—Whenever any person may be convicted in any of the courts of this State for any crime or misdemeanor, who is liable, under existing law, to be sentenced to imprisonment for a period not less than two months and not exceeding one year, such court may, in its discretion, sentence such person to be confined in said House of Correction, instead of other place of confinement.[4]

When any person shall be convicted of larceny in any court of this State, and such court shall be of the opinion, that the interests of public justice will be best promoted by sentencing the person so convicted to the Maryland House of Correction instead of the Penitentiary, it shall have the power to sentence such person to be confined in

[1] Code, art. 27, sec. 349.
[2] Ib., sec. 370.
[3] Ib., sec. 379.
[4] Ib., sec. 310.

the Maryland House of Correction instead of the Maryland Penitentiary; provided, that the said term of confinement in the said Maryland House of Correction shall not be for a less period than may now or hereafter be lawfully imposed for the offense of which such person was so convicted, and that such person so sentenced to confinement in said Maryland House of Correction be not sentenced to be confined therein for a longer period than three years.[1]

Any person, not insane, who is convicted of being a tramp shall be sentenced by the justice of the peace, or by the court, as the case may be, before whom such offender is tried to confinement in the Maryland House of Correction for a period of not less than two months nor more than one year.[2]

When any person is convicted in any court of this State of assault and battery, riot, or any other misdemeanor punishable, under the laws of this State, by imprisonment in jail or by fine and imprisonment in jail, such court shall have power to sentence such person to be confined in the Maryland House of Correction; provided, that the said term of confinement in the said Maryland House of Correction shall not be for a less period than two months.[3]

[1] Code, art. 27, sec. 311.
[2] Ib., sec. 312.
[3] Ib., sec. 313.

CHAPTER XI.

Fines, Costs and Miscellaneous Matters.

§ 126.—**Fines.—Mode of Recovering.**—When any fine or penalty is imposed by any act of Assembly of this State, or by any ordinance of any incorporated city or town of this State, enacted in pursuance of sufficient authority, for the doing of any act forbidden to be done by such act of Assembly or ordinance, or for omitting to do any act required to be done by such act of Assembly or ordinance, the doing of such act or the omission to do such act shall be deemed to be a criminal offense. Such offense, in the City of Baltimore, shall be prosecuted by the arrest of the offender for such offense, and by holding him to appear in or committing him for trial in the Criminal Court of Baltimore, at the Saturday sessions of said Court, which Court shall have jurisdiction in the said cases, and shall proceed to try or dispose of the same in the same manner as other criminal cases triable at the Saturday sessions of said Court may be tried or proceeded with or disposed of; or, such offense may be prosecuted by indictment in such court. Such offenses, in any county of this State, shall be prosecuted by the arrest of the offender for such offense, and by holding him to bail to appear in or committing him for trial in the Circuit Court for the county in which such offense was committed, or by indictment in the Circuit Court for such county for such offense. If any person shall be adjudged guilty of any such offense by any court having jurisdiction in the premises, he shall be sentenced to the fine or penalty prescribed by such act of Assembly or ordinance and to the costs of his prosecution, and, in default of payment thereof, he shall be committed to jail until thence discharged by due course of law. Any indictment for the violation of any ordinance of any incorporated city or town of this State may conclude, "against the form of the ordinance in such case made and provided,

and against the peace, government and dignity of the State."[1]

§ 127.—Same Subject—To Whom Paid.—All fines, penalties and forfeitures, when recovered, shall be paid to the county or city where the same may be imposed, unless directed to be paid otherwise by the law imposing them; but, if there be an informer, he shall have half, unless otherwise provided—this section not to apply to fines or forfeitures for offenses at common law.[2]

§ 128.—Same Subject—Discharge from Jail.—Any person who shall or may hereafter be committed to jail, by the judgment of any court of justice, or by any justice of the peace of this State, for non-payment of any fine and costs, not exceeding the sum of fifty dollars, who shall have remained in custody as aforesaid for the space of thirty days; or any person who shall or may hereafter be committed to jail aforesaid for non-payment of any fine and costs, above fifty and not exceeding one hundred and fifty dollars, who shall have remained in custody aforesaid for the space of sixty days, shall be discharged from further imprisonment on account of said fine and costs; provided, such person shall prove, to the satisfaction of the court imposing said fine and costs, or any judge thereof, or justice of the peace, as the case may be, that he is unable to pay said fine and costs.[3]

§ 129.—Costs.—No person who may be prosecuted for any misdemeanor or offense and discharged by the court on submission, or fined not exceeding fifteen cents, or prosecuted for any crime and acquitted on trial by jury, shall be burdened with the payment of any costs or fees accruing on such prosecution, but all such costs and fees, with the legal costs of the party accused, shall be paid by the county; and no person taken upon any warrant or capias on presentment, where no bill of indictment is found, shall be liable to pay or give security for costs, but such costs shall be paid by the county. The Mayor and City Council of Baltimore shall not, however, be liable, in any

[1] Code, art. 38, sec. 1; Snowden *v.* State, 69 Md.

[2] Code, art. 38, sec. 2.

[3] Ib., sec. 3.

such cases tried in the Criminal Court of Baltimore, for the appearance fees allowed by law to the attorney of the traverser.[1]

§ 130.—**Commitments.**—Warrants of commitment must be under seal.[2]

A commitment in execution of a sentence of a court of competent jurisdiction, or upon a summary judgment for contempt, cannot be assailed collaterally, as upon a return to the writ of *habeas corpus;*[3] and, even in the case of inferior magistrates, the presumption is, that there has been a good conviction and that the magistrate has done everything required by law.[4] But, when a prisoner is brought up by *habeas corpus*, even though he have been committed after sentence of a court or conviction by a magistrate, he may controvert the return, and in case of a conviction by a magistrate (so recited in the commitment), he may show that there has been no conviction in fact, or that it is simply void for want of jurisdiction in the magistrate to make it.[5]

§ 131.—**Custody of Prisoners.**—No citizen of this State, committed to the custody of an officer for any criminal matter shall be removed from thence into the custody of another officer, unless it be by *habeas corpus* or by other legal writ, except where the prisoner shall be delivered to a constable or other inferior officer, to be carried to some

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[1] Code, art. 24, sec. 7.

As to costs in *removed cases*, see Ib., secs. 1-6; Mayor *v.* County Commissioners, 19 Md. 554; County Commissioners Howard *v.* County Commissioners Frederick, 30 Ib. 432; County Commissioners Allegany *v.* County Commissioners Howard, 57 Ib. 393.

Costs in Baltimore City, in certain cases, are payable by the person who instigates the prosecution. Code P. L. L., art. 4, secs. 196, 199.

In certain classes of cases in said City only half the ordinary charges are to be taxed. Ib., sec. 188.

The estate of Penitentiary convicts is liable to costs and charges. Code, art. 27, sec. 302; *ante*, § 123.

[2] Somervell *v.* Hunt, 3 H. & McH. 113.

[3] Exp. Maulsby, 13 Md. 625; In re Morris, 39 Kans. 28.

[4] State *v.* Glenn, 54 Md. 572, 609.

[5] Ib. Cf. Divine's Case, 11 Abb. Pr. R. 90; In re Golding, 57 N. H. 146; In re Davis, 38 Kans. 408; Sennott's Case, 146 Mass. 489; In re Wooldridge, 30 Mo. App. 612.

common jail, or shall be removed from one place to another, within the said county or an adjoining county, in order to his discharge or trial, in due course of law; or in case of sudden fire or infection or other necessity; or where the prisoner shall be charged, by affidavit or other lawful evidence, with treason, felony or other crime, alleged to be done in any other of the United States of America or territories thereof, in which last case he shall, on demand of the executive authority of the state, district or territory from which he fled, be immediately delivered up.[1]

In England, prisoners were removed from one place of imprisonment to another by writ of *habeas corpus ad subjiciendum*, issued at the instance of the crown. Under the above statute, the necessity of a writ for removal of a prisoner from one county to another adjoining is dispensed with, and no mode is prescribed, leaving it to the officers of the law to adopt such other evidence of the legality of the arrest as existed in the case, which, in most instances, is a copy of the original commitment with the endorsements thereon. Hence, a prisoner committed on a legal warrant in one county in this State may be removed to an adjoining county by the sheriff thereof without writ, or other special authority in writing, from a judicial officer.[2]

§ 132.—**Stet.—Nolle Prosequi.**—*Stet processus* is an entry on the record, in the nature of a judgment, of a direction that all further proceedings may be stayed (i. e., that the process may stand), and it is one of the ways in which a prosecution may be put an end to by the prosecuting attorney, as distinguished from a determination of it by a judgment, which is the act of the court.

A *nolle prosequi* is a declaration of record, from the prosecuting attorney, that he will no further prosecute the particular indictment or some designated part thereof.[3]

The power of entering a *nolle prosequi* is exercised at the discretion of the attorney who prosecutes for the State, and for its exercise he alone is responsible.[4]

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[1] Code, art. 42, sec. 16.

[2] Blake *v.* Burke, 42 Md. 45.

[3] 1 Bishop Cr. Proc., § 1387.

[4] 5 Cr. L. Mag. 1.

Where a *stet* has been entered in a criminal case, the party remains liable to be proceeded against under the same indictment;[1] and where a *nolle prosequi* has been entered, the accused remains subject to be proceeded against by another indictment for the same offense.[2]

A *nolle prosequi* may likewise be granted by the Governor, but only on condition that the costs of prosecution shall be paid by the person applying for the same.[3]

§ 133.—**Pardons and other Matters Pertaining to Office of Governor.**—He shall have power to grant reprieves and pardons, except in cases of impeachment and in cases in which he is prohibited by other articles of the Constitution, and to remit fines and forfeitures for offenses against the State, but shall not remit the principal or interest of any debt due the State, except in cases of fines and forfeitures; and before granting a *nolle prosequi* or pardon, he shall give notice, in one or more newspapers, of the application made for it and of the day on, or after which, his decision will be given: and, in every case in which he exercises this power, he shall report, to either branch of the Legislature, whenever required, the petitions, recommendations and reasons which influenced his decision.[4]

The Governor is authorized and required, whenever sentence of death is pronounced on any criminal by the judgment of a court of this State, to issue a warrant to the sheriff of the county or city who ought by law to execute such judgment, ordering and directing the sheriff to execute said judgment at such time as in his warrant he shall appoint.[5]

The Governor, upon giving the notice required by the Constitution, may commute or change any sentence of death into confinement in the Penitentiary or banishment, for such period as he shall think expedient, and, on giving such notice, he may pardon any person convicted of crime on such conditions as he may prescribe, or he may, upon like notice, remit any part of the time for which any person

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[1] State *v.* Morgan, 33 Md. 44.

[2] Ib.; 1 Bishop Cr. Proc., § 1395.

[3] Code, art. 41, sec. 10.

[4] Const., art. 2, sec. 20.

[5] Code, art. 41, sec. 5.

may be sentenced to confinement in the Penitentiary on such like conditions, without such remission operating as a full pardon, to any such person.[1]

If any person pardoned on condition of leaving the State shall return contrary thereto, such person may be arrested by warrant from any judge or justice of the peace; and, if on examination, it shall appear to such judge or justice that there is reasonable ground to believe that the person arrested is the same person who was convicted and pardoned, and that he returned, contrary to the terms of such pardon, he shall be committed to the jail of the county or city where arrested, and the sheriff shall bring him before the first Circuit Court for the county, or, if in Baltimore City, before the first Criminal Court of Baltimore, which shall happen thereafter; and if, on appearing, such person shall acknowledge himself to be the same person pardoned on condition of leaving the State, and that he returned contrary thereto, the court shall record such confession and proceed to pass judgment according to law; and, if the person shall deny that he is the same person convicted and pardoned as aforesaid, or that he returned contrary thereto, the court shall direct the fact to be tried by the jury; and, if they find against the person, the court shall pass such judgment as the law requires for the crime committed.[2]

The Governor may remit the whole or any part of any recognizance which may be forfeited; provided, the judge of the court in which such forfeiture took place shall recommend the remission of the whole or some part thereof.[3]

The part of any fine or forfeiture belonging to an informer shall not be remitted by the Governor; but he may remit any fine or forfeiture, or any part thereof, not belonging to an informer.[4]

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[1] Code, art. 41, sec. 6.

[2] Ib., sec. 7. See People *v.* Moore, 62 Mich. 496.

[3] Ib., sec. 8.

[4] Ib., sec. 9.

CHAPTER XII.

Writs of Error and Appeals.

§ 134.—**Writs of Error.**—A defendant against whom a judgment has been rendered in a criminal case is, *ex debito justitiae*, entitled to prosecute a writ of error.[1] The writ likewise lies at the instance of the State.[2] In order for the writ to lie, there must have been a *final disposition* of the case in the court of first resort.[3] An order removing or refusing to *remove a cause*, civil or criminal, to another court for trial finally adjudicates a constitutional right of the party affected thereby, and it is regarded as a judgment from which, according to the nature of the case, an appeal or writ or error may be immediately prosecuted.[4] It is a general rule, that a writ of error at law lies only to correct errors in matters of law *apparent upon the face of the record*, and such as might have formed sufficient ground, at the proper time, for a motion in arrest of judgment.[5]

A writ of error, after final judgment, subject to the limitations above noted, brings up for review by the appellate tribunal the entire proceedings in the inferior court.[6] Whatever assumes the solemnity of a *judgment* of a court of record is part and parcel of the record and examinable in the appellate tribunal on a writ of error; and, whilst the appellate court cannot find the *facts*, yet the judgment of the inferior court on those facts is a *matter of law*, and, where the facts are found by the court or jury below, it is the proper and legitimate province of the appellate court to

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[1] Anderson *v.* State, 5 H. & J. 174; Manly *v.* State, 7 Md. 135.

[2] State *v.* Buchanan, 5 H. & J. 317.

[3] State *v.* Flannigan, 6 Md. 167; State *v.* Boyle, 25 Ib. 509; Clare *v.* State, 30 Ib. 163; Leagne *v.* State, 36 Ib. 257; Forwood *v.* State, 49 Ib. 531; State *v.* Wade, 55 Ib. 39; State *v.* Hodges, Ib. 127; State *v.* McNally, Ib. 559.

[4] McMillan *v.* State, 68 Md. 307.

[5] Munshower *v.* State, 56 Md. 514; Green *v.* State, 59 Ib. 123.

[6] Clare *v.* State, *supra*.

see that the inferior court has pronounced correctly the law as applicable to the facts.[1]

A writ of error does not stay *execution* in criminal cases.[2]

§ 135.—**No Formal Writs of Error.**—Formal writs of error shall, in all cases, be dispensed with, and the party applying to have the record removed, as upon writ of error, in cases where by law writs of error are allowable, shall, by brief petition, addressed to the court in which the case was tried, plainly designate the points or questions of law by the decision of which he feels aggrieved, which application, so to remove the record, shall be allowed as of right, and no point or question not thus plainly designated in such application shall be heard or determined by the Court of Appeals.[3]

§ 136.—**Appeals upon Prosecutions for Fines or Penalties.**—From any judgment or determination of any court of law in any civil suit or action, or in any prosecution for the recovery of any penalty, fine or damages, any party may appeal to the Court of Appeals.[4]

The effect of the above statute is, in the class of cases designated, to give a remedy by appeal instead of by writ of error.[5] Whenever the punishment, in a criminal case, consists of a fine or penalty, an appeal will lie upon questions of law *apparent on the record;* and such questions sufficiently appear on the record, where the defense is presented in the court below by an *agreed statement of facts.*[6]

§ 137.—**Appeals from Rulings at the Trial.**—In all trials upon indictment or presentment in any court of this State having criminal jurisdiction, it shall be lawful for the party accused, or the State's attorney, in behalf of the State, to except to any ruling or determination of the court.

[1] Ford *v.* State, 12 Md. 514; Clare *v.* State, 30 Ib. 163; Johns *v.* State, 55 Ib. 350; Byers *v.* State, 63 Ib. 267.

[2] Huguenin *v.* Baseley, 15 Ves. Jr. 180; Anderson *v.* State, 5 H. & J. 174.

[3] Code, art. 5, sec. 4; State *v.* Williams, 5 Md. 82; Davis *v.* State, 39 Ib. 355, 386; Hearn *v.* Gould 51 Ib. 319; State *v.* Scarborough, 55 Ib. 345; State *v.* McNally, Ib. 559; Hartman *v.* State, 60 Ib. XIV.

[4] Code, art. 5, sec. 2.

[5] Queen *v.* State, 5 H. & J. 232; Rawlings *v.* State, 1 Md. 127.

[6] Keller *v.* State, 12 Md. 322.

and to tender to the court a bill of exceptions, which shall be signed and sealed by the court, as is now practised in civil cases; and the party tendering such bill of exceptions may appeal from such ruling or determination to the Court of Appeals; provided that the counsel for the accused shall make oath, that such appeal is not taken for delay; and such appeal shall be heard by the Court of Appeals at the earliest convenient day after the same shall be transmitted to said Court; and, after such appeal shall be entered, no judgment shall be rendered against the accused, in case he be found guilty, until the Court of Appeals shall have determined upon the exception; and the accused, if convicted, shall not be entitled to remain on bail until the case is remanded from the Court of Appeals, except in cases in which the punishment is fine or confinement in jail, or confinement in jail or Penitentiary, in the discretion of the court.[1]

The right of appeal under the above provision is confined exclusively to cases where exceptions are taken[2] at the trial.[3] The right to except to rulings of the court in criminal cases rests solely upon the provisions above quoted, the statute of *Westminster* having reference only to civil cases.[4] They must be *sealed*,[5] as well as signed, and this must be done before judgment and as soon after the verdict as is reasonably possible.[6]

A bill of exceptions is a statement of facts which do not properly make part of the record; it must rest upon mat-

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[1] Code, art. 5, sec. 77.

[2] Kearney *v.* State, 46 Md. 422; Johns *v.* State, 55 Ib. 350; Lamb *v.* State, 66 Ib. 285.

[3] Smith *v.* State, 44 Md. 530; Dulany *v.* State, 45 Ib. 99; Pickett *v.* State, 58 Ib. XIII.

[4] Queen *v.* State, 5 H. & J. 232.

By an old act of Assembly, establishing *Assize Courts*, it was formerly provided, that, in criminal cases, where the party accused desired it, the justices should sign and allow bills of exceptions, in the same manner as they were usually allowed in civil cases. Proprietary *v.* King, 1 H. & McH. 83.

[5] Rhinehart *v.* State, 45 Md. 454.

[6] Crouse *v.* State, 57 Md. 327.

As to the manner in which bills of exceptions are to be prepared, see Code, art. 5, sec. 10; Davis *v.* State, 38 Md. 15, 51.

ters which do not otherwise appear upon the record. It does not lie from rulings which are reviewable upon writ of error, such as rulings upon demurrers.[1] Before a ruling excepted to can be reversed, it must appear that the appellant has been injured; hence, where a question allowed to be put to a witness is excepted to, the answer must be set forth, in order to show that it was prejudicial.[2] The presumption always is, until the contrary be made to appear, that all things have been rightly and properly done by a court of competent jurisdiction.[3]

Before the defendant's appeal can be heard, it must appear that the required oath has been taken by the counsel for the accused.[4] If an appeal is presented on behalf of the State, it must appear that it was taken by the State's attorney.[5] After the defendant has been acquitted, however, an appeal by the State can not be entertained.[6]

Both appeals and writs of error, in criminal cases, must be prosecuted *without delay*.[7]

§ 138.—**Reversal and its Consequences.**—Where there is a defect in the proceedings that is merely formal, and it does not appear that injury has been done to the accused, judgment will not be reversed.[8]

When judgment or rulings are reversed on appeal or writ of error, a *new trial*, to be had in the lower court, is awarded by the Court of Appeals. But, if the reversal be in consequence of a defect which goes to the right of the State to maintain the prosecution, in other words, where *no new proceedings* against the defendant can properly be had

[1] Kearney *v.* State, 46 Md. 422; Forwood *v.* State, 49 Ib. 531; Balto. & Yorktown Turnpike Road *v.* State, 63 Ib. 558.

[2] Balto. & Yorktown Turnpike Road *v.* State, *supra*; Lawson *v.* Price, 45 Md. 123, 133.

[3] Dorbert *v.* State, 68 Md. 209.

[4] Weir *v.* State, 39 Md. 434; Rhinehart *v.* State, 45 Ib. 454; Neff *v.* State, 57 Ib. 385.

[5] State *v.* Carter, 49 Md. 8.

[6] State *v.* Shields, 49 Md. 301.

[7] State *v.* Bowers, 65 Md. 363; State *v.* Long, Ib. 365; Clark *v.* State, 68 Ib. 181.

[8] Rawlings *v.* State, 2 Md. 201, 216; Wedge *v.* State, 12 Ib. 232; Hammond *v.* State, 14 Ib. 135; Isaacs *v.* State, 23 Ib. 410; Hays *v.* State, 40 Ib. 633.

thereafter, the judgment or proceedings are simply reversed, without anything more.[1]

Whenever any writ of error or appeal shall be brought upon any judgment, or any indictment, information, presentment, inquisition or conviction in any criminal case, and the Court of Appeals shall reverse the judgment for error in the judgment or sentence itself, it shall be the duty of the Court of Appeals to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, inquisition or conviction; provided, however, that it shall be the duty of the court in passing any sentence under the provisions of this section to deduct from the term of sentence the time already served by the prisoner under the previous sentence from the date of his conviction [2]

[1] Root *v.* State, 10 G. & J. 374; Downs *v.* State, 19 Md. 571; Cushwa *v.* State, 20 Ib. 277, 282; McDonald *v.* State, 45 Ib. 90.

[2] Code, art. 5, sec. 78.

CHAPTER XIII.

Specific Offenses.

§ 139.—**Abduction.**—Abduction means in law the taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion or open violence.[1]

The abduction of females under the age of eighteen years[2] and the abduction of children under the age of twelve years[3] are statutory misdemeanors. If the assent of the person from whose possession a child is taken be obtained by fraud, the taking is deemed to be against the will of such person.[4] The fact that the offender supposes, in good faith and on reasonable grounds, that the child is over the statutory age is immaterial.[5] The phrase "purposes of prostitution" has been held to contemplate common, indiscriminate intercourse with men, not with one man.[6]

Where, upon an indictment for forcibly taking and carrying away children under the age of twelve years and also for persuading and enticing them away from the father, the State introduced testimony to the effect that, in the absence of the father, the defendant came to the former's house and compelled the mother and children to go with him, through threats and intimidation, taking them to the house of a third party, evidence of the declarations of the wife made to such party upon arriving at the house, that she had left home and taken her children with her, not in-

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[1] State *v.* George, 93 N. C. 567.

[2] Code, art. 27, sec. 1.

[3] Ib., sec. 2.

[4] R. *v.* Hopkins, Car. & M. 254; Beyer *v.* People, 86 N. Y. 369.

[5] Bishop Stat. Cr. § 631 *a*; Reg. *v.* Prince, L. R. 2 C. C. 154; S. C., 13 Cox C. C. 138; State *v.* Ruhl, 8 Iowa, 447.

[6] Bishop Stat. Cr. § 641; Osborn *v.* State, 52 Ind. 526; Slocum *v.* People, 90 Ill. 274; Comm. *v.* Cook, 12 Metc. 93; Carpenter *v.* People, 8 Barb. 603; State *v.* Ruhl, *supra*; State *v.* Stoyell, 54 Me. 24; People *v.* Parshall, 6 Park. C. C. 129.

tending to live longer with her husband, and that she had procured the defendant to assist in the removal, is admissible in defense.[1] Upon an indictment for enticing a female under the age of eighteen years from her home for the purpose of prostitution, the defendant may show, by way of impeaching her evidence, that she had stated, "that he was not to blame, but it was her fault that they went away."[2] The previous relations of the parties may be proven upon an indictment for enticing a female for purposes of prostitution, as bearing upon the intent in enticing her away.[3]

§ 140.—**Abortion.**—There is a conflict of authority as to whether abortion is an offense at the common law, some cases holding that abortion is an indictable misdemeanor at common law,[4] others the contrary doctrine.[5] An abortion that results in the death of the woman[6] or the death of the child[7] after it passes from her alive is common-law murder; and, when the act is committed against the consent of the woman, it is an aggravated assault.[8] The whole matter is fully covered by statute in this State, extending to the advertisement and sale of articles intended to be used for purposes of abortion as well as the use of any agency or means to produce abortion.[9] The advising, soliciting and inciting a pregnant woman to take certain noxious and poisonous drugs for the purpose of causing an abortion is not an offense under the statute.[10]

Where the offense is charged as having, at such a time and place, been committed by the defendant, he "not being

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[1] Robinson *v.* State, 57 Md. 14.

For definition of "entice," see Nash *v.* Douglass, 12 Abb. Pr N. S. 187.

[2] Phillips *v.* State, 60 Md. XIV.

[3] People *v.* Carrier, 46 Mich. 442.

[4] Mills *v.* Comm. 13 Pa. St. 633; Comm. *v.* Demain, 6 Pa. L. J. 29; S. C., Brightly, 441; State *v.* Slagle, 83 N. C. 630.

[5] Mitchell *v.* Comm., 78 Ky. 201; S. C., 39 Am. Rep. 227; Comm. *v.* Parker, 9 Metc. 263; S. C., 43 Am. Dec. 396.

[6] Bishop Stat. Cr. § 742.

[7] Ib.

[8] Ib., § 744.

[9] Code, art. 27, sec. 3; Lamb *v.* State, 67 Md. 524.

[10] Lamb *v.* State, *supra*.

then and there a regular practitioner of medicine," this allegation sufficiently negatives the whole proviso; but it is not clear that the proviso need be at all negatived.[1]

Where parties are jointly indicted for producing an abortion, the declarations of one may be given in evidence, provided such evidence be followed up by proof of conspiracy or confederation.[2] Where a woman was tried for having produced an abortion upon one who, at the time, was an inmate of her house, it was held competent to show the character of the house—that it was a house of ill-fame—in order that the jury might know whether the place was one where the crime charged could be committed without fear of detection and punishment.[3] The prosecution may give in evidence statements made by the accused, when examined as a witness before the coroner's inquest, in regard to the circumstances attending the arrival at her house of the deceased and her sickness and death there—the accused, at the time of the examination, not being under arrest and no charge having been preferred against her.[4] The statement of the deceased in relation to her symptoms and condition, made to her attending physician, may be given in evidence, but not her statements to him by way of narrative of what had happened before the physician visited her.[5] Evidence that the defendant made a subsequent attempt to accomplish the abortion by different means is admissible to show with what purpose and intent he made the attempt charged as well as to corroborate the evidence of the first attempt.[6]

§ 141.—**Adultery.**—Adultery is the voluntary sexual intercourse of a married person with one not the husband or wife.[7] To constitute the crime of adultery as against the

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[1] Hays *v.* State, 40 Md. 633.

[2] Ib.

[3] Ib.

[4] Ib.

[5] Ib.

[6] Lamb *v.* State, 67 Md. 324.

[7] Bishop Stat. Cr. § 354.

In all cases where one of the parties to an act of criminal intercourse is married and the other is not, it is said, by Mr. Bishop, to be adultery in the married party and fornication in the unmarried. Ib., § 356.

man, the consent of the woman to the carnal intercourse is not indispensable, but the offense may, as against him, exist though the intercourse was effected by force and against her will,[1] or the woman was in such a state of stupefaction as to be incapable of consent.[2] The penalty is a fine of ten dollars.[3]

§ 142.—**Arson and Burning.**—The offense of arson, which is a felony at common law, is defined[4] to be the malicious[5] and voluntary (or wilful[6]) burning[7] of the house[8] of another,[9] by night or by day. The punishment is prescribed by statute.[10] Statutes also provide against the burning of untenanted dwelling-houses,[11] vessels[12] public buildings,[13] arsenals, magazines, ships or naval stores,[14] fences, hay or tobacco,[15] outhouses and the like,[16] and attempting to burn dwelling-houses, outhouses or grain.[17]

The word "empty" in section 12, article 27, Code of Public General Laws, must be considered as relative and used in contradistinction to enumerated articles, and, therefore, within the view of the law, every barn that does not

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[1] State *v.* Donovan, 61 Iowa, 278; Egbert *v.* Greenwalt, 44 Mich. 245; S. C., 38 Am. Rep. 260.

[2] Comm. *v.* Bakeman, 131 Mass. 577; S. C., 141 Am. Rep. 248.

[3] Code, art. 27, sec. 5.

[4] 3 Inst. 66; 1 Hale P. C. 566.

[5] Kellenbeck *v.* State, 10 Md. 431.

[6] Jones *v.* Hungerford, 4 G. & J. 402.

[7] There must be an actual burning of the house or some part of it, though it is not necessary that any part should be wholly consumed or that the fire should have any continuance. 2 Bishop Cr. L. § 10; Cochrane *v.* State, 6 Md. 400.

[8] The house is, in general terms, said to include a building, with its outbuildings, finished for habitation. 2 Bishop Cr. L. § 11; Gibson *v.* State, 54 Md. 447.

[9] 2 Bishop Cr. L. §§ 12, 13.

[10] Code, art. 27, sec. 6.

[11] Ib., sec. 7.

[12] Ib., sec. 8.

[13] Ib., sec. 9.

[14] Ib., sec. 10.

[15] Ib., sec. 11.

[16] Ib., sec. 12.

[17] Ib., sec. 13.

contain personal property must be considered as empty.[1] A school-house, not parcel of a dwelling-house, is embraced by the statutory terms "any other outhouse not parcel of a dwelling-house."[2]

The word "burn" is necessary in indictments for arson;[3] it must also be alleged that the act was done *maliciously*[4] and *feloniously*;[5] and the property must be described in such terms as to show that it is a proper subject of arson.[6] The burning of barns and other outhouses "not parcel of any dwelling-house," is a distinct offense from arson, and the qualifying words here stated are essential parts of the description of the offense and must be contained in the indictment.[7]

§ 143.—**Assault and Battery.**—A battery is defined to be the unlawful beating of another, and an assault is an attempt to beat another without touching him. But it is held that a purpose to commit violence on the person of another, if not accompanied by an effort to carry it into immediate execution, falls short of an assault; yet, where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the attempt is complete.[8]

The offense of brutally assaulting and beating one's wife is specially provided for by statute.[9]

Every person convicted of the crime of an assault with intent to rob, murder or commit a rape shall be sentenced to confinement in the Penitentiary for not less than two years nor more than ten years.[10] In these cases the specific intent is of the essence of the offense. Thus, upon an indictment for assault with intent to murder, in order to justify a conviction, the facts and circumstances proved in the case

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[1] House *v.* House, 5 H. & J. 125.
[2] Jones *v.* Hungerford, 4 G. & J. 402.
[3] Cochrane *v.* State, 6 Md. 400.
[4] Kellenbeck *v.* State, 10 Md. 431.
[5] Gibson *v.* State, 54 Md. 447.
[6] Ib.
[7] Kellenbeck *v.* State, *supra*; Gibson *v.* State, *supra*.
[8] Lamb *v.* State, 67 Md. 524, 534, 535; Handy *v.* Johnson, 5 Ib. 45.
[9] Code, art. 27, secs. 14, 15.
[10] Ib., sec. 16.

must be such that, if death had ensued, the offense would have been, not manslaughter, but murder.[1] In the case of an assault with intent to rape, the evidence must show, not merely that the defendant committed an assault upon the woman for the purpose of having carnal intercourse with her, but that, at the time of committing the assault, he intended to compel her, by force and against her will, to have sexual intercourse with him, notwithstanding any resistance she might make.[2]

The matter of "night-assaults" in the City of Baltimore is covered by special statutes.[3]

Where an assault is charged, the jury are to decide whether there was an intention to do any violence or injury. If, in a threatening and rude or angry manner, a man points a sword or fork at another, or shakes his fist in the face of another, within striking distance, attended with present ability to strike, although no stroke is given, such act is an assault, notwithstanding the failure to strike; and the jury cannot infer a want of intention to do violence or injury merely from the failure to strike, in the absence of any declarations or circumstances indicating an absence of such intention, other than the fact that no blow was given. If, however there are any declarations or circumstances tending to indicate a want of such intention, then the jury are bound to take them into consideration in deciding upon the intention.[4] Declarations or acts accompanying or immediately following the commission of the alleged assault are competent and proper evidence to explain the act. The circumstances proposed to be given in evidence need not have occurred at the precise time when the principal fact happened: if they arose either at the time or so soon thereafter as to constitute a part of the transaction, they serve to give color and definiteness to it and are admissible.[5] Where an assault with a specific

[1] 2 Wharton Cr. L. § 1279; Fenwick *v.* State, 63 Md. 239.

[2] State *v.* Cannada, 69 Iowa, 397; Krum *v.* State, 19 Neb. 728; State *v.* McDevitt, 69 Iowa, 549; People *v.* Lynch, 29 Mich. 274; State *v.* Kendall, 34 N. W. Rep. 843.

[3] Code P. L. L., art. 4, secs. 71–73.

[4] Handy *v.* Johnson, 5 Md. 450.

[5] Ib.

intent is charged, the defendant may testify as to the particular intent entertained by him. Thus, a person on trial for an assault with intent to murder may testify as to the purpose for which he procured the implement with which he committed the assault.[1]

An indictment for assault with intent to murder, rob or commit a rape is good, if it state, with the usual precision, the facts requisite to constitute an assault, and alleges the intent with which it was made in the words of the statute;[2] but it may go further and allege an assault with intent *feloniously* to murder, rape or rob.[3] The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done are considered matters of evidence for the jury to demonstrate the intent, but need not be incorporated in the indictment.[4] When the indictment is for assault and battery, the omission to state the name of the party upon whom the assault was committed is not fatal, if it appears by necessary intendment from another portion of the same count alleging the battery—the indictment being in this wise: that *A*, did, at such a time and place, assault one ——— and him, *the said B*, did then and there beat, etc.[5] Omitting useless verbiage, which sometimes does harm, by confusing jurors, an indictment for assault and battery should allege, "that *A*, at *such a time and place*, did make an assault upon *B*, and him, the said *B*, then and there did beat, bruise, wound and ill-treat."[6]

§ 144.—**Bastardy.**—This entire subject is regulated by statute.[7] The proceedings are classed as criminal, the offense being a misdemeanor,[8] and prosecutions therefor must be commenced within one year from the birth of the

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[1] Fenwick *v.* State, 63 Md. 239; Greer *v.* State, 53 Ind 420.

[2] Lewis *v.* State, 32 Md. XII; Hollohan *v.* State, Ib. 399.

[3] Hollohan *v.* State, *supra*.

[4] State *v.* Dent, 3 G. & J. 8.

[5] Harne *v.* State, 39 Md. 552.

[6] Bishop Directions, § 201.

[7] Code, art 12.

[8] Oldham *v.* State, 5 G. 90; State *v.* Phelps, 9 Md. 21; Owens *v.* State, 10 Ib. 164.

child.[1] The jurisdiction and mode of proceeding, being special, must be strictly pursued.[2]

The affidavit of the mother, the foundation of the proceedings, may properly be made in the county in which she and the child reside, and be transmitted to the county in which the supposed father resides; and a magistrate of the latter county may recognize him to appear before the court thereof, at its next session, to answer the charge.[3] The indemnity must be given to the county in which the child is.[4] Yet, while the principal design of the proceeding is to indemnify the county, its character as a criminal prosecution to punish *fornication* is not thereby changed, and, when the offense was perpetrated in another State, no prosecution can be maintained here.[5] If the putative father feels aggrieved by the judgment of the magistrate, he must proceed as the statute directs; otherwise the action of the magistrate is conclusive.[6] When the party, however, proceeds as directed, by entering into a recognizance for his appearance at court, the same proceedings are had as in other criminal cases; that is, there must be a presentment and indictment, upon which the trial must proceed as in other criminal cases.[7] The regularity of the proceedings before the magistrate does not come into question upon the indictment.[8] Where the *mother* has given security to indemnify the county, all further proceedings are barred.[9]

The indictment need not allege the residence of the mother, but must show in what county the child is at the time of the finding thereof.[10] The proceedings before the magistrate need not be alleged.[11]

[1] Bake *v.* State, 21 Md. 422; Neff *v.* State, 57 Ib. 385.

[2] Root *v.* State, 10 G. & J. 374.

[3] Ib.

[4] Ib.: Mong *v.* State, Ib. 380; Norwood *v.* State, 45 Md. 68: Robinson *v.* State, 68 Ib. 617.

[5] Owens *v.* State, 10 Md. 164.

[6] Huyett *v.* Slick, 43 Md. 284.

[7] Norwood *v.* State, *supra.*

[8] Neff *v.* State, *supra.*

[9] State *v.* Trimble, 33 Md. 468.

[10] Robinson *v.* State, *supra.*

[11] Norwood *v.* State, *supra.*

The ordinary rules in regard to the relevancy and admissibility of evidence prevail.[1] The mere presence of the child in court is not ground of objection.[2] But it has been considered "dangerous doctrine" to permit a child's paternity to be questioned or proved by the comparings of the color of its hair or eyes with that of the alleged father.[3] The proceeding being criminal, the paternity of the child should be established beyond a reasonable doubt.[4]

§ 145.—**Bigamy.**—The Statute of 1 Jac. 1, ch. 11, is in force in this State, modified by section 17, article 27 of the Code of Public General Laws as to the punishment of the offense, but not as to the grade, which is felony, nor as to the essential characteristics.[5]

The State must satisfy the jury, beyond a reasonable doubt, that, *at the very time of the second marriage*, the first husband or wife, as the case may be, was alive.[6] Marriage, in such cases, can not be proven by general reputation, cohabitation or acknowledgment.[7] A marriage, valid in all respects, must be shown by direct proof.[8] To constitute a lawful marriage in Maryland, some religious ceremony must be added to the civil contract.[9]

It has been held proper to charge the jury that, if they believe that the defendant had been informed that his wife had obtained a divorce, and that he had used due care and

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[1] Norwood *v.* State, 45 Md. 68.

[2] Hutchinson *v.* State, 19 Neb. 262.

[3] People *v.* Carney, 29 Hun, 47.

As to allowing the child to be exhibited to the jury, see State *v.* Smith, 54 Iowa, 104; S. C., 37 Am. Rep. 192; Clarke *v.* Bradstreet, 80 Me. ; S. C., 10 Crim. L. Mag. 881.

As to evidence, on behalf of the accused, of the child's resemblance to a third person, see Paulk *v.* State, 52 Ala. 427; S. C., 1 Am. Cr. R. 57.

[4] Van Tassel *v.* State, 59 Wis. 351.

[5] Barber *v.* State, 50 Md. 161.

[6] Jones *v.* Jones, 48 Md. 391, 398, 399; Reg. *v.* Lumley, L. R. 1 C. C. R. 196; Squire *v.* State, 46 Ind. 459.

[7] Sellman *v.* Bowen, 8 G. & J. 50.

[8] Bishop Stat. Cr. § 609; Catherwood *v.* Caslon, 13 M. & W. 261; Gaines *v.* Relf, 12 How. 472, 535; Gahagan *v.* People, 1 Park. Cr. R. 378.

[9] Denison *v.* Denison, 35 Md. 361.

made due inquiry to ascertain the truth, and had, considering all the circumstances, reason to believe, and did believe, at the time of the second marriage, that his former wife had been divorced from him, then they should acquit.[1] The courts have been somewhat strict in requiring full proof of the allegations made in the indictment.[2] When the first marriage was contracted abroad, the prosecution must prove the validity according to the foreign law.[3]

§ 146.—**Blasphemy and Profanity.**—The offenses of blasphemy[4] and profanity[5] are defined and the punishment and mode of procedure are regulated by statute.

§ 147.—**Boundaries.**—Penalties are imposed for destroying boundaries[6] and for setting up new boundaries without notice,[7] and the mode of procedure[8] is regulated, by the provisions cited in the notes.

§ 148.—**Bribery and Impeding Justice.**—Bribery in the case of public officers,[9] embracery in the case of jurors,[10] influencing, intimidating or impeding jurors, witnesses and court officers and other obstructions of justice,[11] and bribery of voters[12] are all provided for in the sections cited in the notes hereto.

§ 149.—**Burglary and Kindred Offenses.**—A burglar is "he that, in the night-time, breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not."[13] The grade of the offense is felony. There must be a *breaking*, which signifies, to make an opening or way of admission

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[1] Squire *v.* State, 46 Ind. 459.

[2] R. *v.* Deeley, 4 C. & P. 579: S. C., 1 Moody C. C. 303; Drake's Case, 1 Lew. C. C. 25.

[3] People *v.* Lambert, 5 Mich. 349.

[4] Code, art. 27, sec. 18.

[5] Ib., sec. 19.

[6] Ib., sec. 20.

[7] Ib., sec. 21.

[8] Ib., sec. 22.

[9] Ib., sec. 23.

[10] Ib., sec. 24.

[11] Ib., sec. 25.

[12] Ib., sec. 26.

[13] Robinson *v.* State, 53 Md. 151.

into the building;[1] an *entry*, which is completed when any part of the body or when the instrument used in the commission of the felony passes within the dwelling-house;[2] and the breaking and entry must both be at *night*.[3] Those portions of the morning and evening wherein, though the sun is below the horizon, sufficient is above for the features of a man to be reasonably discerned are day.[4] The breaking must be of another's *dwelling-house*, which term means the apartment, building or cluster of buildings in which a man with his family resides.[5] The *intent* must be to commit a felony, not a misdemeanor;[6] and it must be clearly established; but it may be inferred from the actions of the accused, or shown by his prior declarations.[7] The *specific intent* charged in the indictment must be proven;[8] and it must be shown to have existed at the time of the original breaking and entry.[9] The penalty is prescribed by statute.[10]

The crime of breaking a dwelling-house in the day-time, with intent to commit murder or other felony therein, or breaking a store-house, warehouse or other outhouse, in the day or night, with such intent,[11] and the crime of breaking into any shop, storehouse, tobacco house or warehouse, although the same be not contiguous to or used with any

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[1] Bishop Stat. Cr. § 312.

[2] 2 Bishop Cr. L. § 92.

[3] Ib.

[4] Bishop St. Cr. § 276.

[5] Ib., §§ 278–290.

Where a person occupying a room or dwelling broken into abides therein only by *sufferance*, having no *fixed interest*, the burglary can not be laid as of the dwelling of such occupant. 1 Hawk. P. C. ch. 38, s. 13; 2 East P. C. 501–505; R. *v.* Stock, 2 Taunt. 309; R. *v.* Wilson, R. & R. 115; R. *v.* Sefton, Ib. 202; R. *v.* Jenkins, Ib. 244; R. *v.* Davis, Ib. 499; R. *v.* Jobling, Ib. 525; Reg. *v.* Courtenay, 5 Cox C. C. 218; State *v.* Betsall, 11 W. Va. 703, 728; Rodgers *v.* People, 86 N. Y. 360; S. C., 40 Am. Rep. 548; Neubrandt *v.* State, 53 Wis. 89.

[6] Robinson *v.* State, 53 Md. 151.

[7] People *v.* Marks, 4 Park. C. C. 153; State *v.* Cowell, 12 Nev. 337.

[8] Neubrandt *v.* State, *supra*.

[9] 2 Bishop Cr. L. § 113.

[10] Code, art. 27, sec. 27.

[11] Ib., sec. 28.

mansion house, and stealing thence to the value of one dollar or upwards[1] are likewise punishable by virtue of statutory provisions.

§ 150.—**Concealed Weapons.**—The carrying or wearing of dangerous or deadly weapons concealed upon or about the person and the carrying or wearing of such weapons openly, with the intent or purpose of injuring any person, are statutory offenses.[2] Such statutes have frequently been held not to conflict with the constitutional right of the people of the United States to keep and to bear arms.[3]

The word "concealed" has been held to mean, wilfully and knowingly covered and kept from sight.[4] The phrase "about his person" has been held to mean, concealed near, in close proximity to him, and within his control and easy reach, so that he could promptly use it, if impelled to do so by any violent motive.[5] "Carry," in the sense of statutes prohibiting the carrying of arms, means "wear."[6] If the weapon is merely and in good faith being transported, to be repaired, or given to another, or for purposes of trade, or any like object, it can not be said to be *worn*.[7]

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[1] Code, art. 27, sec. 29.

[2] Ib., sec. 30.

[3] State *v.* Speller, 86 N. C. 697; State *v.* Jumel, 13 La. Ann. 399; Wright *v.* Comm., 77 Pa. St. 470; State *v.* Shelby, 90 Mo. 302; State *v.* Mitchell, 3 Blackf. (Ind.) 229; State *v.* Reid, 1 Ala. 612; Andrews *v.* State, 3 Heisk. (Tenn.) 165; S. C., 8 Am. Rep. 8; Aymette *v.* State, 2 Humph. (Tenn.) 154; State *v.* Wilburn, 7 Baxt. (Tenn.) 57; Haynes *v.* State, 5 Humph. (Tenn.) 120; State *v.* Buzzard, 4 Ark. 18; Fife *v.* State, 31 Ib. 455; S. C., 25 Am. Rep. 556; Haile *v.* State, 38 Ib. 564; Hill *v.* State, 53 Ga. 472; Nunn *v.* State, 1 Ib. 243; English *v.* State, 35 Tex. 493; S. C., 14 Am. Rep. 374; U. S. *v.* Cruikshank, 92 U. S. 542. But, see Bliss *v.* Comm., 2 Litt. (Ky.) 90.

[4] Bishop Stat. Cr. §§ 787, 788; State *v.* Johnson, 16 S. C. 187; Street *v.* State, 67 Ala. 87; Smith *v.* State, 69 Ind. 140.

[5] State *v.* McManus, 89 N. C. 555.

[6] Page *v.* State, 3 Heisk. (Tenn.) 198; State *v.* Carter, 36 Tex. 89; Owen *v.* State, 31 Ala. 389.

[7] Carr *v.* State, 34 Ark. 448; S. C., 36 Am. Rep. 15; Page *v.* State, 3 Heisk. (Tenn.) 198; State *v.* Gilbert, 87 N. C. 527; Waddell *v.* State, 37 Tex. 355; Christian *v.* State, Ib. 475; Brooks *v.* State, 15 Tex. App. 88; Mangum *v.* State, Ib. 362; State *v.* Brodnax, 91 N. C. 543; State *v.* Harrison, 93 Ib. 605; Pressler *v.* State, 19 Tex. App. 52; S. C., 53 Am. Rep. 383; Moorefield *v.* State, 5 Lea (Tenn.) 348. Cf. Cutsinger

The statements of defendants charged with this offence have, under various circumstances, been held admissible to criminate[1] as well as to exculpate.[2] Carrying a weapon concealed is an act *continuous* in its nature, and there can be only one conviction, even though the weapon be exhibited at different houses in the same neighborhood.[3] The carrying can not be prosecuted by the same commonwealth in more than one suit.[4]

§ 151.—**Conspiracy.**—Briefly stated, conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.[5] The thing intended need not be accomplished: the bare combination constitutes the crime.[6]

It is sufficient to allege in the indictment the conspiracy and the object of it: the means by which it was intended to be accomplished need not be set out.[7]

The acts and declarations of one of several parties jointly indicted for this offense are admissible against his co-defendants, provided the combination be proven.[8]

One person alone can not be convicted of conspiracy,[9] and the record of acquittal of one defendant is evidence for his co-defendants subsequently tried;[10] but the trial and acquittal of parties elsewhere can not deprive this State of jurisdiction over a conspiracy committed within its borders.[11] When the field of operations embraces several states, the state in which all or any of them reside and in which the

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v. Comm., 7 Bush (Ky.) 392; State *v.* Martin, 31 La. Ann. 849; Walls *v.* State, 7 Blackf. (Ind.) 572; Morton *v.* State, 46 Ga. 292; State *v.* Woodfin, 87 N. C. 526; Titus *v.* State, 42 Tex. 578; Preston *v.* State, 63 Ala. 127.

[1] Shorter *v.* State, 63 Ala. 129.

[2] Wilson *v.* State, 33 Ark. 557.

[3] Smith *v.* State, 79 Ala. 257.

[4] State *v.* Shelby, 90 Mo. 302.

[5] 2 Bishop Cr. L. § 171; State *v.* Buchanan, 5 H. & J. 317.

[6] 2 Bishop Cr. L. § 192; State *v.* Buchanan, *supra*.

[7] State *v.* Buchanan, *supra*.

[8] Bloomer *v.* State, 48 Md. 521. Cf. State *v.* Jackson, 82 N. C. 565.

[9] 2 Bishop Cr. L. § 187; note, 5 H. & J. 500.

[10] Bloomer *v.* State, *supra*.

[11] Ib.

conspiracy originated or was conducted has jurisdiction to punish the offense.[1]

An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen is not indictable as a conspiracy, if such act, committed by one person, would not be punishable as an offense.[2]

§ 152.—**Counterfeiting and Forgery.**—The term counterfeit signifies the fabrication of a false image or representation. It refers usually to imitations of coin or paper money. Forgery is defined to be the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[3] The entire subject of counterfeiting and forgery is regulated by statutes in this State.[4] The mode of pleading and the sufficiency of the evidence are likewise regulated by statute.[5] The alleged forged writing should be produced at the trial,[6] or the proper foundation laid for secondary evidence, as in civil cases.[7] To prove the *scienter*, evidence is admissible, that the defendant had, about the same time, uttered or attempted to utter other forged instruments of the same description.[8]

§ 153.—**Cruelty to Animals.**—There is no general legislation upon this subject. Various kinds of cruelty and neglect are provided for in local laws relating to the City of Baltimore[9] and several of the counties.

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[1] Bloomer *v.* State, 48 Md. 521.

[2] Code, art. 27, sec. 31.

[3] 2 Bishop Cr. L. § 523; Arnold *v.* Cost, 3 G. & J. 220.

[4] Code, art. 27, sec. 32–46.

[5] Ib., § 291; *ante*, p. 73; Hawthorn *v.* State, 56 Md. 530.

As to forgery of certificates of "Baltimore City stock," see Bishop *v.* State, 55 Md. 138. As to forgery of bank checks, see Hawthorn *v.* State, *supra;* Laird *v.* State, 61 Md. 309.

[6] 3 Greenl. Ev. § 107.

[7] Ib.; Brashears *v.* State, 58 Md. 563.

[8] 3 Greenl. Ev. § 111; Bishop *v.* State, *supra;* Bell *v.* State, 57 Md. 108.

[9] Code, P. L. L. art. 4, secs. 241–245.

§ 154.—**Defaulters.**—Defaulting public officers are punishable for neglect to pay over public moneys within the time specified by statute.[1]

§ 155.—**Destroying Property Maliciously.**—Under this title, various offenses are defined and made punishable by statute.[2]

§ 156.—**Disturbance of Public Peace.**—Any person who shall wilfully hinder or obstruct the free passage of persons passing by or along any public street or highway in any city or town of this State, or who shall wilfully disturb any neighborhood in such city or town, by loud and unseemly noises, or shall profanely curse and swear, or use obscene language, upon or near to any such street or highway, within the hearing of persons passing by or along such highway, shall, upon conviction thereof, be sentenced to a fine of not less than one dollar and to the costs of his prosecution, or to such fine and costs and to imprisonment in jail, in the discretion of the court—this section not to apply to Frederick County.[3]

§ 157.—**Drunkenness and Disorderly Conduct.**—Every person who shall be found drunk, or acting in a disorderly manner, to the disturbance of the public peace, upon any public street or highway, in any city or county of this State, or at any place of public worship or public resort or amusement in any city or county of this State, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of one dollar and costs, and shall be committed until such fine and costs are paid, or until such offender is discharged by due course of law. The justices of the peace for the respective counties of this State shall have concurrent jurisdiction over such offense with the Circuit Courts for their respective counties; and the justices of the peace selected to sit at the respective station-houses in the City of Baltimore shall have concurrent jurisdiction over such offense with the Criminal Court

[1] Code, art. 27, sec. 47: Johns *v.* State, 55 Md. 350; State *v.* Nicholson, 67 Ib. 1.

[2] Code, art. 27, secs. 48-66.

[3] Code, art. 27, sec. 67.

of Baltimore—this section not to apply to Frederick County.[1]

§ 158.—**Dueling.**—A duel is a fighting together of two persons, by previous concert, and with deadly weapons, to settle some antecedent quarrel.[2] Persons fighting duels, or sending or accepting challenges so to do, or acting as seconds, or otherwise aiding or assisting the principal offenders, are incapable of holding office, unless relieved from the disability by act of Assembly.[3] The offense is regulated by statute.[4]

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[1] Code, art. 27, sec. 68.

A person is drunk, in a legal sense, when he is so far under the influence of intoxicating liquor that his passions are visibly excited or his judgment impaired by the liquor—State *v.* Pierce, 65 Iowa, 85, 88.

[2] 2 Bishop Cr. L. § 213.

[3] Const., art. 3, sec. 41.

[4] Code, art. 27, secs. 69–71.

CHAPTER XIV.

Specific Offenses—Continued.

§ 159.—**Elections.**—Various offenses are created and penalties imposed by article 33, Code of Public General Laws, title "Elections," and by article 4, Code of Public Local Laws, title "City of Baltimore," under the subtitle "Elections," embraced within sections 262 to 273, inclusive, and sub-title "Primary Elections," embraced within sections 274 to 297, inclusive. The sale, disposal or giving away of liquors, or the keeping open of drinking establishments on election days in the counties is punishable by a fine of not less than fifty nor more than one hundred dollars.[1] In the City of Baltimore it is unlawful to keep open on any election day any drinking establishment, or barroom, or grog shop, or to furnish any spirituous or fermented liquor therein or therefrom. Any person guilty of violating this prohibition, or of retailing or dispensing any spirituous or fermented liquors on any election day, forfeits his license, if he shall have taken out any, and is disqualified from taking out any other license for the sale of such liquors for the space of five years thereafter, and is, moreover, liable to a penalty of five hundred dollars, to be recovered by the Board of police by civil action in the name of the State.[2]

Under the former, perhaps also the latter statute, the giving away of liquors in one's own house on election day to a friend, in the course of hospitality, is an offense.[3]

§ 160.—**Embezzlement.**—The law relating to this offense is statutory, arising out of a desire to amend the law of larceny so as to reach those cases where there has been a stealing of goods or chattels but no technical asportation or trespass in the original acquisition of possession. A

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[1] Code, art. 33, secs. 88, 89.

[2] Code P. L. L., art. 4, sec. 264.

[3] Cearfoss *v.* State, 42 Md. 403.

variety of offenses is embraced under this title.[1] Embezzlement may be defined to be a fraudulent appropriation of the money or goods of another, which were entrusted to the care of the person appropriating the same as servant, bailee or otherwise.

§ 161.—**Escaping from Penitentiary.**—Convicts escaping may be sentenced to such additional confinement and hard labor, agreeably to the laws of this State, as the Criminal Court of Baltimore shall adjudge and direct, and persons aiding them are liable to such confinement in the Penitentiary as the said Court may adjudge, not less than eighteen months nor more than two years.[2]

§ 162.—**False Pretenses.**—This offense is wholly statutory.[3] A false pretense may be defined to be such a fraudulent representation of an existing fact or past event, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.[4] The false representation must be the operative cause of the parting with the money or other article. If the person whose property is obtained knows the representations to be false, there can be no conviction.[5]

§ 163.—**Female Sitters.**—Female sitters are prohibited at variety entertainments and concert halls. All females who are allowed in or about the premises, who shall drink, smoke or partake of any kinds of eatables or refreshments at the expense of others, or solicit others to purchase such things as may be purchased there, upon which they shall receive or expect to receive a commission, or who may be paid a regular salary therefor, or who participate in any way in the profits thereof are deemed sitters.[6]

§ 164.—**Female Waiters.**—Women or girls may not be employed as waiters at theaters, museums or other places of amusement in the City of Baltimore.[7]

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[1] Code, art. 27, secs. 72–80.

[2] Code, art. 27, sec. 81.

[3] Code, art. 27, secs. 82, 84.

As to form of *indictment*, see State *v.* Scribner, 2 G. & J. 246, 253; Code, art. 27, sec. 288.

[4] 2 Bishop Cr. L. § 415.

[5] Stansbury *v.* Fogle, 37 Md. 369, 388, 389.

[6] Code, art. 27, secs. 85, 86.

[7] Code P. L. L., art. 4, secs. 913, 914.

§ 165.—**Fraud.**—Various acts and omissions in relation to bills of lading,[1] butter and oleomargarine,[2] conversion by factors of consigned goods,[3] conversions of money or securities,[4] corporate misrepresentation,[5] sales of flour and whiskey,[6] fruit and vegetable packing,[7] fraud upon gas companies,[8] fraud by hirers,[9] millers mixing flour,[10] fraud by mortgagors of personal property,[11] rehypothecation of personal securities,[12] sales of seeds,[13] special partnerships,[14] and warehouse, storage and elevator receipts[15] are made penal by statutes under this title.

§ 166.—**Fugitive Convicts.**—Fugitive felons may be sentenced to undergo a confinement in the Penitentiary during the residue of the term for which they have been condemned, but, if demanded by the state whence they escaped, must be delivered up.[16]

§ 167.—**Funerals—Collection of Tolls from.**—The collection of tolls upon any carriages or other vehicles, or horses going to or returning from any funeral, is made punishable by statute.[17]

§ 168.—**Gaming.**—All games, devices and contrivances at which money or any other thing shall be bet or wagered are prohibited and punishable by statute.[18] If a *billiard table,* which is expressly exempted from the penalties of

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[1] Code, art. 27, sec. 87.
[2] Ib., secs. 88-91; Pierce *v.* State, 63 Md. 592.
[3] Code, art. 27, sec. 92.
[4] Ib., secs. 93-96.
[5] Ib., sec. 97.
[6] Ib., sec. 98-99.
[7] Ib., secs. 100-104.
[8] Ib., secs. 105, 106.
[9] Ib., sec. 107.
[10] Ib., secs. 108-110.
[11] Ib., sec. 111.
[12] Ib., sec. 112,
[13] Ib., secs. 113-117.
[14] Ib., sec. 118.
[15] Ib., sec. 119.
As to what constitutes a warehouse or storage receipt, see State *v.* Bryant, 63 Md. 66.
[16] Code, art. 27, sec. 120.
[17] Ib., sec. 121.
[18] Ib., secs. 122-132.

this legislation, were in fact used as a faro table, it would, *ipso facto*, lose the immunity conferred upon it.[1] The keeping of any house or other place for the purpose of gambling is within the letter of the law.[2] But the selling of pools on horse races and the keeping of rooms where such pools are sold do not constitute an offense within the meaning of the statutes against gambling.[3] Money lost at gaming may be recovered by suit,[4] and all securities given for gambling considerations are absolutely void.[5] The form of indictment and the manner of procedure under the gaming laws are also regulated by statute.[6]

§ 169.—**Graveyard Desecration.**—The removal or attempt to remove bodies from graveyards, burial grounds or vaults after burial therein, unless under authority of the State's attorney for the city or county where such graveyard, burial ground or vault is situated, for the purpose of ascertaining the cause of the death of the person whose body is so removed, or for the purpose of reburial, is a misdemeanor, punishable by not less than five nor more than fifteen years in the Penitentiary,[7] this provision, however, having no application to such persons as shall have been buried in Potter's field.[8] Other species of graveyard desecration are also made punishable by statute.[9]

§ 170.—**Gunning.**—Hunting upon the lands of another with gun or dog, without license from the owner or possessor is an offense for which the offender forfeits five dollars to the party aggrieved, recoverable before a justice of the peace in the name of the State—this section not applying to Dorchester County.[10]

§ 171 —**Health.**—Under this title, the manufacture or sale of candy or cakes which may contain any ingredient

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[1] State *v.* Price, 12 G. & J. 260.
[2] Wheeler *v.* State, 42 Md. 563.
[3] James *v.* State, 63 Md. 242.
[4] Code, art. 27, sec. 127.
[5] Gough *v.* Pratt, 9 Md. 526.
[6] Code, art. 27, secs. 289, 290; Wheeler *v.* State, *supra*.
[7] Code, art. 27, sec. 133.
[8] Ib., sec. 134.
[9] Ib., sec. 135.
[10] Ib., sec. 136.

that may be deleterious, injurious or poisonous to the consumer is made a misdemeanor, punishable by a fine of not less than fifty nor more than two hundred dollars;[1] the employment of children under the age of sixteen years in cotton, woolen or other manufacturing establishments for more than ten hours in one day is made punishable by a fine not exceeding fifty dollars;[2] requiring or permitting employees of corporations or individuals to work more than twelve hours during each or any day of twenty-four hours is made a misdemeanor, punishable by a fine of one hundred dollars, and, in the case of corporations, is also a cause of forfeiture of the corporate franchise;[3] the sale, bartering or giving away, by dealers, vendors or manufacturers, of cigars, cigarettes, smoking or chewing tobacco to minors under the age of fourteen years, unless previously authorized in writing by the parents or guardian, or where a minor is acting solely as the agent of his employer, is punishable by a fine of not less than ten nor more than one hundred dollars, or, in default of payment, imprisonment in jail for not less than five nor more than thirty days;[4] manufactories, manufacturing establishments and workshops are required to be kept in a sanitary condition, under a penalty of one hundred and fifty dollars.[5] In the City of Baltimore it is made the duty of all employers of females in any mercantile or manufacturing business or occupation to provide and maintain suitable seats for the use of such female employees, and to permit the use of such seats by such employees to such an extent as may be reasonable for the preservation of their health, a violation of this provision being a misdemeanor, punishable by a fine of one hundred and fifty dollars.[6]

§ 172.—**Heating Steam Passenger Cars.**—After the 1st day of May, 1890, steam railroads may not heat their passenger cars by any stove, or furnace kept inside the car or suspended therefrom, the punishment being a penalty

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[1] Code, art. 27, secs. 137, 138.
[2] Ib., secs. 139–141.
[3] Ib., secs. 142–144.
[4] Ib., secs. 145–147.
[5] Ib., secs. 148, 149.
[6] Code P. L. L., art. 4, secs. 398, 399.

of one thousand dollars, upon conviction, and an additional penalty of one hundred dollars for each day during which the violation shall continue.[1]

§ 173.—**Importing Convicts.**—Every commanding officer, captain or master of any vessel who shall be convicted of wilfully importing in such vessel into this State from any foreign country, and not any part of the United States, any felon or convict shall be sentenced to the Penitentiary for not less than eighteen months nor more than five years.[2]

§ 174.—**Incest.**—Every person who shall knowingly have carnal knowledge of another person, being within the degrees of consanguinity within which marriages are prohibited by the law in this State, shall be deemed guilty of felony, and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not less than one nor more than ten years, in the discretion of the court.[3] Sexual commerce between parties thus related is indictable, whether under the form of a marriage or without it;[4] and illegitimate consanguinity has the same effect as legitimate.[5]

§ 175.—**Kidnapping.**—Every person, his counselors, aiders or abettors, who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of this State any person, with intent to have such person carried out of this State, shall be sentenced to the Penitentiary for not less than two nor more than ten years.[6] Every person, his counselors, aiders or abettors, who shall be convicted of kidnapping and forcibly or fraudulently stealing or carrying away any child under the age of sixteen years, shall be sentenced to the Penitentiary for not less than five nor more than twelve years.[7]

§ 176.—**Larceny.**—Larceny is defined to be the taking and removing, by trespass, of personal property which the trespasser knows to belong, either generally or specially, to

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[1] Code, art. 27, secs. 150, 151.
[2] Ib., sec. 152.
[3] Ib., sec. 153.
[4] Bishop Stat. Cr. § 727.
[5] Ib.; State *v.* Laurence, 95 N. C. 659.
[6] Code, art. 27, sec. 154.
[7] Ib., sec. 155.

another, with the intent to deprive such owner of the ownership therein.[1] Whether or not the act must be *lucri causa*, is a question upon which the authorities are not harmonious.[2] The offense is felony. The *wrongful intent* must be fully shown. Thus if a person takes the goods of another in good faith, under color or claim of right, no matter how ill-founded, he cannot be guilty of this offense.[3] And, if the original taking is lawful, a subsequent conversion with fraudulent intent can not be construed as larceny. An instance of this is to be found in the case of *lost goods*. If a person, not knowing the owner, has taken them into possession, he cannot afterward, having ascertained who the owner is, commit larceny of them.[4]

The penalty for the crime of simple larceny to the value of five dollars or upwards is imprisonment in the Penitentiary for not less than one year nor more than fifteen years, and, in all cases where the value of the thing taken is less than fifty dollars, the court also has discretionary power to pass sentence of imprisonment in jail or the House of Correction instead of the Penitentiary.[5] The penalty for larceny under the value of five dollars, and larceny of money, goods or chattels under the value of one dollar in any shop, storehouse, tobacco-house or warehouse, although the same be not contiguous to or used with any mansion house, into which the defendant has broken, is imprisonment, in the discretion of the court, in the jail or Penitentiary, not exceeding eighteen months.[6] Robbery or larceny of any obligation or bond, bill obligatory or bill of exchange, bank note or notes, promissory notes for the payment of money, check or order drawn on any bank in this State or any

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[1] 2 Bishop Cr. L. § 758.

[2] Ib., secs. 842–848. See State *v.* Hodges, 55 Md. 127, 136.

[3] Ib., sec. 851.

[4] Ib., sec. 838; 3 Inst. 108; 1 Hale, 506, 507; People *v.* Cogdell, 1 Hill, N. Y. 94; People *v.* Anderson, 14 Johns. 294; Lane *v.* People, 10 Ill. 305; Porter *v.* State, Mart. & Y. 226; State *v.* Long, 1 Hayw. N. C. 157, n.; Hunt *v.* Comm., 13 Gratt. 757; Tanner *v.* Comm., 14 Ib. 635; Reg. *v.* Preston, 5 Cox C. C. 390; Reg. *v.* Dixon, 7 Ib. 35; Reg. *v.* Shea, Ib. 147; Reg. *v.* Christopher, 8 Ib. 91; Reg. *v.* Glyde, 11 Ib. 103; Reg. *v.* Deaves, Ib. 227; Reg. *v.* Ashwell, 16 Ib., 1; Reg. *v.* Flowers, Ib. 33.

[5] Code, art. 27, sec. 156.

[6] Ib., sec. 157.

other state, paper bill of credit, certificate granted by or under the authority of this State, or of the United States, or any of them, or of any last will and testament, or codicil, shall be punished in the same manner as robbery or larceny of goods and chattels.[1] There are special statutory provisions, under the title of "Larceny," relating to buoys,[2] corn and willows,[3] dogs,[4] goods, wares and merchandise entrusted to be manufactured,[5] horses,[6] metallic checks,[7] pipes, water or gas fixtures,[8] ships[9] and tobacco plants.[10]

Where a person steals goods in another state and brings them into this, the act of bringing such stolen goods into this State is a new larceny for which the party may be tried here.[11]

The indictment need not give a very particular description of the goods alleged to have been taken.[12] It is sufficiently certain to describe the article as "one hide," of such a value.[13] The description given in the law which enacts the offense, in the case of statutory larcenies, has in general been deemed sufficient.[14] But such description must be clearly given, and a defect therein can not be aided by implication.[15] An allegation of value as a certain number of "dollars and cents, current money," or even, perhaps, only a certain number of "dollars and cents" is sufficient.[16] It is not objectionable to lay the ownership of the goods alleged to have been taken in different persons in various counts of the same indictment.[17]

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[1] Code, art. 27. sec. 158.
[2] Ib., sec. 159.
[3] Ib., sec. 160.
[4] Ib., sec. 161.
[5] Ib., secs. 162. 163.
[6] Ib., secs. 164, 165.
[7] Ib., sec. 166.
[8] Ib., sec. 167.
[9] Ib., sec. 168.
[10] Ib., sec. 169.
[11] Worthington *v.* State. 58 Md. 403.
[12] State *v.* Scribner. 2 G. & J. 246.
[13] State *v.* Dowell. 3 Ib. 310.
[14] State *v.* Scribner, *supra;* State *v.* Cassel, 2 H. & G. 407.
[15] Kearney *v.* State, 48 Md. 16; Stewart *v.* State, 62 Ib. 412.
[16] Gardner *v.* State. 25Md. 146.
[17] State *v.* McNally, 55 Md. 559.

The sentence must be in accordance with statutory requirements; but, if a *lighter burden* is thereby imposed upon the convict than the statute contemplates, this affords no ground of reversal.[1]

§ 177.—**Letters—Wrongfully Opening.**—If any person whatsoever shall presume to take and break open any letter whatsoever, not being unto him directed, or not having special license from the person to whom the same is directed, his executors or administrators, so to do, he shall, on conviction thereof, suffer imprisonment for six days and be fined fifteen dollars, one-half to the State and the other half to the informer.[2]

If any person shall wilfully break the seal of any letter or package belonging to the public, he shall, on conviction thereof, be fined two hundred dollars, one-half to the informer and the other half to the State.[3]

§ 178.—**Libel.**—A libel is defined to be any representation, in writing, or by pictures, effigies or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.[4] Words, though not slanderous in themselves, if put in writing and published and tending in any degree to the discredit of a man, are libelous, when they defame a private person only, or persons in public capacity, in which latter case they are said to receive an aggravation, as they tend to scandalize the government by reflections on those who are entrusted with the administration of public affairs.[5]

When a man intentionally and personally publishes of another matter which is libelous, he is held to have malice in law against that other, whatever may have been his motives in fact.[6]

In case any person shall be prosecuted, by indictment or any other criminal prosecution, for a libel, the party so prosecuted shall be entitled to give the truth of the matter

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[1] Isaac *v.* State, 23 Md. 410.
[2] Code. art. 27. sec. 170.
[3] Ib., sec. 171.
[4] 2 Bishop Cr. L. ⅞ 907.
[5] Richardson *v.* State, 66 Md. 205.
[6] 2 Bishop Cr. L. ⅞ 922; Richardson *v.* State, *supra*.

charged in the said indictment or other prosecution in evidence, under the general issue, by way of justification.[1]

§ 179.—**License Laws.—Penalties.**—Under this head penalties are imposed for keeping or exhibiting for use billiard tables without a license,[2] disposing of merchandise without a "trader's" license,[3] disposing of spirituous or fermented liquors or lager beer without a license,[4] selling or bartering liquor to minors or to other persons, if the same is to be drunk by minors.[5] Special provisions also obtain in relation to "oyster-house" licenses[6] and ordinary and inn-keepers and retailers.[7]

All the acts of Assembly relating to licenses form one entire system and must be construed together.[8]

Where a trader or keeper of an ordinary whose license has expired discontinues his business, he may, without renewing his license, sell and dispose of his chattels, including his stock of goods remaining on hand.[9]

In prosecutions for violations of these laws, especially in relation to the sale of liquors, evidence may be introduced to show the *real nature* of a transaction of the accused, wherever disguise or evasion is resorted to.[10]

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[1] Code, art. 75, sec. 15.

As to form of *indictment*, see Richardson *v.* State, 66 Md. 205.

[2] Code, art. 56, sec. 9; Germania *v.* State, 7 Md. 1; Scolly *v.* State, 23 Ib. IX; Schmetzer *v.* State, 63 Ib. 420.

[3] Code, art 56, secs. 35–54, 85, 88, 89.

Where a trader's license is taken out by a partnership, and one of the partners assigns his interest to his associate and retires from the firm, the business may be continued by the remaining partner under the same license. Spielman *v.* State, 27 Md. 520.

[4] Code, art. 56, secs. 55–66, 84, 85, 88, 89.

[5] Ib., sec. 86.

A licensed dealer cannot escape the penalty of this offense by proving that the sale was made by his barkeeper, during his absence, without his knowledge and contrary to his instructions, given in good faith. Carroll *v.* State, 63 Md. 551; *ante*, § 20.

The minor himself is a competent witness to prove his own age. Pearce *v.* Kyzer, 84 Tenn. 521.

[6] Code, art. 56, secs. 82, 83; State *v.* Cahen, 35 Md. 236.

[7] Code, art. 71; Downs *v.* State, 19 Md. 571.

[8] Spielman *v.* State, *supra.*

[9] Forwood *v.* State, 49 Md. 531.

[10] Archer *v.* State, 45 Md. 33.

As to form of *indictment*, see Spielman *v.* State, *supra.*

§ 180.—**Lotteries.**—All sales, drawings, dealings and contrivances of every description in the nature of lotteries and all advertisements in relation thereto are prohibited by statute.[1] The form of the indictment and the matter of amending the same are also the subject of statutory regulation.[2]

Under an indictment charging the traverser with having sold a lottery ticket, evidence that he had sold, to the person named in the indictment, pieces of paper, commonly known as "policies," that entitled the purchaser to receive a specified sum of money on the happening of the contingency of certain numbers being drawn in a lottery of the same date, was held to be admissible.[3]

[1] Code, art. 27, secs. 172 186.
[2] Ib., secs. 289, 290; State *v.* Scribner, 2 G. & J. 246.
[3] Smith *v.* State, 68 Md. 168.

CHAPTER XV.

Specific Offenses, Continued.

§ 181.—**Maiming.**—Mayhem, at common law, is defined to be "a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or annoy his adversary."[1] The grade of the offense is doubtful.[2] The penalty for the offense of mayhem, or of tarring and feathering, is imprisonment in the Penitentiary for not more than ten years nor less than eighteen months.[3] Various kindred offenses are enumerated and their punishment prescribed by statute.[4] In indictments for these statutory offenses, the description must follow the language of the statute and the defendant must be brought within all the material words thereof.[5]

§ 182.—**Malfeasance in Office.**—Any act or omission, in disobedience of official duty, by one who has accepted public office, is, when of public concern, in general, punishable as a crime.[6] When the act in question is that of *judicial officers*, all that the law can secure is a guarantee that they shall not, with impunity do wrong wilfully, fraudulently or corruptly. If they do so act, they are liable, both civilly and criminally; but for errors of judgment they are not liable, either civilly or criminally.[7] A justice of the peace, having discharged a prisoner brought before him, charged with the larceny of certain bank notes and promissory notes, and having refused to deliver the same, which he had taken from the prisoner, when on examination, to a third person, to whom the prisoner had assigned them, an indictment was found against the justice of the peace, charg-

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[1] 2 Bishop Cr. L. ⅞ 1001.
[2] Ib., ⅞ 1008.
[3] Code. art. 27, sec. 187.
[4] Ib.. secs. 188, 189.
[5] State *v.* Elborn, 27 Md. 483.
[6] 1 Bishop Cr. L. ⅞ 459; Martin *v.* State, 1 H. & J. 721.
[7] Bevard *v.* Hoffman, 18 Md. 479.

ing that he, at such a time and place, being then and there a justice of the peace, unlawfully, wilfully, oppressively, corruptly and in violation and contempt of his duty as justice of the peace, neglected and refused to deliver the said bank notes and promissory notes to the said person to whom they had been assigned, being then and there requested so to do, well knowing that he was entitled to receive the same. It was held, that the facts alleged constituted an indictable offense, and that it was immaterial whether the law imposed upon the magistrate the duty to receive the property or not—it having been received by him *colore officii*, if not *virtute officii*, there could be no doubt as to his legal obligation to restore it to the person entitled.[1]

§ 183.—**Manslaughter.**—Homicide is the killing of a human being by a human being. A child becomes a human being, within this definition, when it has completely proceeded in a living state from the body of its mother, whether it has or has not breathed, and whether the umbilical cord has or has not been severed, and the killing of such a child is homicide, whether it be killed by injuries inflicted before, during or after birth.[2] As a general proposition, he whose act causes, in any way, directly or indirectly, the death of another, kills him, within the law of homicide.[3] If a man, in doing what the law neither requires nor forbids, or in strictly performing a legal duty, and exercising such care as the circumstances demand, causes the death of another, he commits no offense; but, if he is doing something which the law does not command, of a sort endangering life—or, if, in the performance of a legal duty, he is grossly careless, in a way to put life in jeopardy,—or if he is committing some breach of the criminal laws which is *malum in se*—or if he is neglecting a legal duty, where the neglect endangers life,—he then becomes guilty of a felonious homicide, should death, whether intended or unintended, result within a year and a day.[4]

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[1] Hiss *v.* State, 24 Md. 556.

As to prosecutions for misconduct of *officers of registration*, see Mincher *v.* State, 66 Md. 227.

[2] Stephen Dig. Cr. L., art. 218; 2 Bishop Cr. L. §§ 632, 633.

[3] 2 Bishop Cr. L. §§ 635–641.

[4] Ib., § 656.

Felonious homicides are divided into murder and manslaughter, which are regarded, not as different degrees of the same offense, but as separate crimes.[1] Manslaughter is unlawful, or felonious, homicide without malice aforethought. Murder is unlawful, or felonious, homicide with malice aforethought.[2]

The legal meaning of malice aforethought in cases of homicide is not confined to homicide committed in cold blood, with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, when the act is done with such cruel circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit.[3]

Every person convicted of the crime of manslaughter shall be sentenced to the Penitentiary for not more than ten years, or, in the discretion of the court, may be fined not more than five hundred dollars, or be imprisoned in jail for not more than two years, or be both fined and imprisoned in jail.[4]

§ 184.—**Marrying Unlawfully.**—Under this title various acts in relation to marriages are prohibited and penalties prescribed therefor.[5]

§ 185.—**Mineral Waters, Porter and Other Beverages.**—The provisions under this title are designed for the protection of bottlers and dealers in beverages in the exclusive use of certain boxes and vessels, a description of which has been recorded by them.[6]

§ 186.—**Minors—Care and Protection of.**—Every agent, officer or representative of any institution, society or body, incorporated under the laws of this State, for the care, custody or protection of children or minors, having in his possession, custody or personal charge any minor, or person under twenty-one years of age, for any purpose connected with the objects of such institution, society or body, shall

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[1] Weighorst *v.* State, 7 Md. 442, 451.

[2] Stephen Dig. Cr. L., art. 223.

[3] U. S. *v.* Cornell, 2 Mason, 91; Comm. *v.* Webster, 5 Cush. 295, 306, 307, 308; Nye *v.* People, 35 Mich. 16.

[4] Code, art. 27, sec. 190.

[5] Ib., secs. 191–200.

[6] Ib., secs. 201–207.

be entitled to all the privileges and authority of a conservator of the peace; and any person, whether under the claim or color of authority over the person of such minor, as parent, guardian or otherwise, or under any other color, pretense or claim, who shall, in any manner, interfere with or obstruct such agent, officer or representative, in relation to his possession, custody or personal charge of such minor, shall be guilty of a misdemeanor; and it shall be the duty of all officers of the police, policemen, constables and officers and officials of every description having the authority to make arrests to enforce this section in every particular.[1]

It shall be unlawful for any person, be he [a] licensed dealer or not, to sell, barter or give away any firearms whatsoever or other deadly weapons, except shot guns, fowling pieces and rifles, to any minor under the age of twenty-one years. Any person violating this section shall, on conviction thereof, pay a fine of not less than fifty nor more than two hundred dollars, together with the costs of prosecution, and, upon failure to pay said fine and costs, shall be committed to jail and confined therein until such fine and costs are paid, or for the period of sixty days, whichever shall first occur.[2]

In the City of Baltimore it is unlawful for any person having a permit or license to erect or keep a billiard saloon or billiard table to allow any minor to play at any game in such saloon or on any billiard table, under the penalty of ten dollars for the first offense and twenty dollars for every subsequent offense.[3] It has been held that, in such cases, a conviction may be had without proving that the keeper of the saloon knew of the presence of the minor or of the fact of his minority.[4]

Pawnbrokers in the City of Baltimore are prohibited from receiving deposits from any minor or apprentice, knowing him to be such.[5]

[1] Code, art. 27, sec. 208.
[2] Ib., sec. 209.
[3] Baltimore City Code, art. 33, sec. 4 (Ordinances.)
[4] State *v.* Probasco, 62 Iowa, 400; *ante*, § 20.
[5] Baltimore City Code, art. 33, sec. 32 (Ordinances.)

§ 187.—**Murder.**—Murder is unlawful, or felonious, homicide with malice aforethought.[1]

All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree.[2]

All murder which shall be committed in the perpetration of or attempt to perpetrate any arson shall be murder in the first degree.[3]

All murder which shall be committed in the burning or attempting to burn any barn, tobacco house, stable, warehouse or other outhouse, not parcel of any dwelling house, having therein any tobacco, hay, grain, horses, cattle, goods, wares or merchandise, shall be murder in the first degree.[4]

All murder which shall be committed in the perpetration of or attempt to perpetrate rape, sodomy, mayhem, robbery or burglary shall be murder in the first degree.[5]

All other kinds of murder shall be deemed murder in the second degree.[6]

And the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder in the first or second degree; but, if such person be convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime and to give sentence accordingly; and every person liable to be prosecuted for petit treason shall, in future, be indicted, proceeded against and punished as is directed in other kinds of murder, according to the degree.[7]

Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors shall suffer death.[8]

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[1] See *ante*, § 183.

[2] Code, art. 27, sec. 210.

[3] Ib., sec. 211.

[4] Ib., sec. 212.

[5] Ib., sec. 213.

[6] Ib., sec. 214.

As to death caused by obstruction of railroads, see *post*, § 195.

[7] Ib., sec. 215.

[8] Ib., sec. 216.

Every person convicted of the crime of murder in the second degree or as accessory thereto shall be sentenced to the Penitentiary for not less than five nor more than eighteen years.[1]

In an indictment for murder it is not necessary to aver the circumstances which determine the degree as defined by the statute above quoted. The object of this legislation was the mitigation of the punishment in cases of the second degree; there was no design to change the form of the pleading.[2]

In a trial for murder, the State may prove, as bearing upon the question of malice, that, on the day before the fatal assault and several days prior thereto, the prisoner had beaten and otherwise maltreated the deceased, and may follow up this evidence and show, that, prior to the assault, the deceased was in ordinary health and that afterward he complained of pains in his head and breast and that he continued to complain up to the day of the homicide, such evidence as to the physical condition of the deceased at the time when the injuries were inflicted aiding in the determination of the question of his having died from the effects of such injuries.[3] The mere fact that a *post mortem* examination is made some time after death is not in itself a reason why the result of such examination should be excluded, unless the interval is so great and the condition of the body such that the jury could not reasonably find whether its condition was to be attributed to *ante mortem* or *post mortem* causes.[4] On a trial for murder, evidence of what occurred at a saloon half a block removed from another saloon where the homicide occurred and only four or five minutes before the killing is admissible to show the movements and general conduct of the prisoner immediately preceding the killing and that he was armed and prepared for mischief and in a frame of mind likely to result in mischief.[5]

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[1] Code, art. 27, sec. 217.

[2] Davis *v.* State, 39 Md. 355.

[3] Williams *v.* State, 64 Md. 384. As to admissibility of evidence of *statements of deceased*. see Reg. *v.* Gloster, 16 Cox C. C. 471.

[4] Ib.

[5] Kernan *v.* State, 65 Md. 253.

In the kind of murder in the first degree described as "wilful, deliberate and premeditated" there must be the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate offspring of rashness and impetuous temper and that the mind has become fully conscious of its own design.[1]

The form of the verdict upon indictments for homicide is discussed in another part of this work.[2]

§ 188.—**Negroes—Fornication With.**—Any white woman who shall suffer or permit herself to be got with a child by a negro or mulatto, upon conviction thereof in the court having criminal jurisdiction, either in the city or county where such child was begot, or where the same was born, shall be sentenced to the Penitentiary for not less than eighteen months nor more than five years.[3]

§ 189.—**Nuisance.**—A public or common nuisance is any act or neglect the product of which works an annoyance or injury to the entire community.[4] The evil must be of magnitude requiring judicial interposition and within the reasons on which the decisions of the courts have in times past proceeded; or, the offense may be created and defined by statute.[5] The grade of the offense at the common law is misdemeanor. Obstructing a public road is an indictable nuisance,[6] also the carrying on of an offensive trade,[7] non-repair of its road by a railway company,[8] and the keeping of a bawdy or other disorderly house.[9] No such thing as prescription can be set up as a defense to an in-

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[1] Comm. *v.* Drum, 58 Pa. St. 9.

[2] *Ante*, § 115.

[3] Code, art. 27, sec. 218.

[4] 1 Bishop Cr. L. § 1072.

[5] Ib.

[6] State *v.* Price, 21 Md. 448.

[7] Horner *v.* State, 49 Md. 277; Clayton *v.* State, 60 Ib. 272; State *v.* Mott, 61 Ib. 297.

[8] Balto. & Yorktown Road *v.* State, 63 Md. 573.

[9] Henson *v.* State, 62 Md. 231; S. C., 50 Am. Rep. 204; S. C., 5 Crim. L. Mag., 693.

Leasing to another a house with the intent of its being used as a common bawdy house is also an offense indictable at common law. Smith *v.* State, 6 G. 425.

dictment for maintaining a public nuisance.[1] When the indictment has the necessary allegations and is sustained by the proofs, the final judgment of the court may contain an order that the defendant abate the nuisance.[2]

§ 190.—**Obscene Publications.**—Whenever any newspaper or periodical publication contains any obscene or licentious matter, every proprietor and publisher is guilty of a misdemeanor, and liable to a fine of not less than twenty nor more than two hundred dollars and imprisonment for not less than ten days nor more than one year; and each successive number of any newspaper or periodical containing such obscene or licentious matter is deemed to be a new publication thereof.[3]

Any person who, in any way, produces or causes to be produced any print or representation of an indecent or immoral nature, or sells, gives away, distributes, posts up or exhibits to the public or an individual any such print or representation, or causes this to be done, is guilty of a misdemeanor, punishable by a fine of not less than twenty nor more than two hundred dollars and imprisonment for not less than ten days nor more than one year.[4]

In an indictment for publishing obscene and licentious matter, the obscene character of which is only disclosed by explanatory words and innuendoes, it is necessary to aver, that it was so known and understood by the person charged with its publication. The indictment should contain an express allegation of such guilty knowledge or something equivalent to it. In all cases, where the true character and meaning of a publication are to be gathered from extrinsic facts and circumstances, these are to be set out in the indictment by way of introductory averments and explanatory innuendoes.[5]

§ 191.—**Opium Joints.**—All persons instrumental in providing the means for smoking or using opium, or leasing, renting or permitting premises to be so used, or not giving

[1] P. W. & B. R. R. *v.* State, 20 Md. 157.

[2] 1 Bishop Cr. L. § 1079; Wroe *v.* State, 8 Md. 416.

[3] Code, art. 27, sec. 219.

[4] Ib., sec. 220. As to the legal test of "indecency," see 11 Crim. L. Mag. 121.

[5] Nicholson *v.* State, 36 Md. XI.

information, if their premises are so used, or, in any manner, soliciting or causing others to visit such places or to use opium, or exhibiting apparatus, devices or instruments for smoking or using opium, or participating in such exhibition are guilty of a misdemeanor; and provision is made for searching premises and seizing and destroying apparatus; but this legislation does not apply to druggists or physicians, or others engaged in the legitimate use or sale of opium.[1]

§ 192.—**Oysters.**—Various penal provisions in relation to oysters, their destruction, measuring them, the time of taking them are to be found in the Code of Public General Laws,[2] and this legislation has, on a number of occasions, been the subject of judicial interpretation. The decisions will be found collected in a note.[3]

§ 193.—**Perjury.**—Perjury, at the common law, is defined to be the wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry.[4]

An oath or affirmation, if made wilfully and falsely, in any of the following cases, shall be deemed perjury: first, in all cases where false swearing would be perjury at common law; secondly, in all affidavits required by law to be taken; thirdly, all affidavits to accounts or claims made for the purpose of inducing any court or officer to pass such accounts or claims; fourthly, all affidavits required to be made to reports and returns made to the General Assembly or any officer of the government.[5]

Any person who shall procure another to make a false oath or affirmation in any of the cases embraced in the preced-

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[1] Code, art. 27, secs. 221–225.

[2] Art. 72.

[3] Destroying oysters—State *v.* Mister, 5 Md. 11. Bedding of oysters—Phipps *v.* State, 22 Md. 380. Disposing of oysters by heaping measure—McGrath *v.* State, 46 Md. 631. Carrying oysters without license—State *v.* Insley, 64 Md. 28. Dredging beyond prescribed limits—Jones *v.* State, 68 Md. 613.

[4] 2 Bishop Cr. L. § 1015.

[5] Code, art. 27, sec. 226; Deckard *v.* State, 38 Md. 186; State *v.* Bixler, 62 Ib. 354.

ing section shall be deemed guilty of subornation of perjury.[1]

In indictments for perjury it is sufficient to set forth the substance of the offense charged upon the defendant and by what court or before whom the oath was taken, averring such court or person or persons to have a competent authority to administer the same, together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed.[2]

In informations or indictments for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it is sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of the record or proceeding, either in law or equity, and without setting forth the commission or authority of the court or person or persons before whom the perjury was committed, or was agreed or promised to be committed.[3]

Every person who shall be convicted of the crime of perjury or subornation of perjury shall be sentenced to undergo a confinement in the Penitentiary for not less than five nor more than ten years.[4]

§ 194.—**Poison—Attempting To.**—Every person, his aiders, advisors or abettors, who shall be convicted of the crime of attempting to poison any person shall be sentenced

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[1] Code, art. 27, sec. 227.

Subornation of perjury is the procuring of a man to take a false oath amounting to perjury, the person procured or incited *actually taking the oath;* but bargaining with or inciting a person to commit perjury, though the oath be not taken, is also an offense at common law. 2 Bishop Cr. L. § 1197.

[2] Stat. 23 Geo. 3, ch. 11, sec. 1; Alexander Br. Stat. 766; Deckard *v.* State, 38 Md. 186.

[3] Stat. 23 Geo. 3, ch. 11, sec. 2; Alexander Br. Stat. 766.

[4] Code, art. 27, sec. 228.

to undergo a confinement in the Penitentiary for not less than two nor more than ten years.[1]

§ 195.—**Railroads—Obstructing.**—If any person shall place anything or cause anything to be placed on any railroad in this State, calculated to obstruct, overthrow or direct from the track of such railroad any car, vehicle or carriage traveling or passing on such railroad, or shall break or injure, in any manner, any railroad in this State, with the view or intent to obstruct or overthrow any car, vehicle or carriage, such person so offending shall be deemed guilty of a felony and, upon conviction thereof, shall be sentenced to the Penitentiary for not less than two years nor more than ten years.[2]

If the death of any person shall be occasioned by the overthrow or obstruction of any railroad car, vehicle or carriage, produced by the placing of any thing or obstruction on any railroad, or by breaking or injuring any railroad or any bridge attached thereto, in violation of the preceding section, then the person so placing the thing, or obstructing, or breaking or injuring shall be deemed guilty of murder.[3]

§ 196.—**Rape.**—Rape is the unlawful carnal knowledge by a man of a woman forcibly and against her will.[4] The grade of the offense is felony. A boy under fourteen years is conclusively presumed to be incapable of committing the offense, whatever be the real fact.[5] The offense may be committed upon a female of any age provided actual force be used;[6] and, even though no force be used, it is provided by statute, that, if any person shall carnally know and abuse any woman child under the age of ten years, every such carnal knowledge shall be deemed felony, and the offender, being convicted thereof, shall, at the discretion of the court, suffer death or undergo a confinement in the Penitentiary for not less than eighteen months nor more

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[1] Code, art. 27, sec. 229.

[2] Ib., sec. 230.

[3] Ib., sec. 231.

[4] 2 Bishop Cr. L. § 1113. Cf. 6 Crim. L. Mag. 220.

[5] Ib., § 1117; 3 Greenl. Ev. § 215; 1 Wharton Cr. L., 8 ed., § 551.

[6] 2 Bishop Cr. L. § 1118.

than twenty-one years.[1] The word "abuse" in this connection applies to injuries to the genital organs and does not include ill usage.[2] The consent of the child in such cases is immaterial,[3] and the fact that the defendant believed, no matter upon what grounds, that the child was over the statutory age affords no defense or excuse.[4] The child may be a witness as to her own age.[5]

Every person convicted of the crime of rape, or as being accessory thereto before the fact, shall, at the discretion of the court, suffer death or undergo a confinement in the Penitentiary for not less than eighteen months nor more than twenty-one years; and penetration shall be evidence of rape, without proof of emission.[6]

§ 197.—**Receiving Stolen Goods, Money or Securities.**—Every person who shall be convicted of the crime of receiving any stolen money, goods or chattels, knowing the same to be stolen, or of the crime of receiving any bond, bill obligatory, or bill of exchange, promissory note for the payment of money, bank note, paper bill of credit, certificate granted by or under the authority of this State, or of the United States, or any of them, knowing the same to be stolen, shall restore such money, goods or chattels, or thing taken and received, to the owner thereof, or make restitution to the value of the whole, or such part as shall not be restored, and shall undergo a confinement in the Penitentiary for not less than eighteen months nor more than ten years; and such receiver may be prosecuted and punished, although the principal offenders shall not have been convicted.[7]

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[1] Code, art. 27, sec. 233.

[2] Dawkins *v.* State, 58 Ala. 376; S. C., 29 Am. Rep. 754; State *v.* Ellis, 74 Mo. 385; State *v.* Woolaver, 77 Ib. 103.

[3] State *v.* Willoughby, 76 Mo. 215; State *v.* Jones, 16 Kans. 611.

[4] Bishop Stat. Cr., § 490.

[5] Weed *v.* State, 55 Ala. 13; Hill *v.* Eldridge, 126 Mass. 234. Cf. Bain *v.* State, 61 Ala. 75; Cherry *v.* State, 68 Ib. 29; Comstock *v.* State, 14 Neb. 205, 207.

[6] Code, art. 27, sec. 232.

[7] Code, art. 27, sec. 234; *ante*, § 11; Kearney *v.* State, 48 Md. 16; Hodges *v.* State, 55 Ib. 127.

A receiver from a receiver is not indictable under this statute. Bishop Stat. Cr. § 1140.

§ 198.—**Religious Meetings.**—Under this title, penalties are provided in the case of persons disposing of liquors or other articles of traffic within two miles of any camp-meeting or other place of religious worship and of persons interrupting or disturbing any religious congregation, society or meeting, or person attending the same, it being expressly provided, that nothing contained in this legislation should prevent the courts of record from exercising their common-law jurisdiction in all cases for disturbing public worship.[1]

§ 199.—**Rivers.**—Under this title statutory provisions obtain making it penal to cast ballast and other matter into certain waters in this State, to obstruct streams, to remove soil from the bed of rivers and the like.[2]

§ 200.—**Robbery.**—Robbery is larceny committed by violence from the person of one put in fear.[3] From the person does not necessarily mean from actual contact with the body, but, if the taking is from under the personal protection or control of another, this is sufficient.[4] Force means either actual violence or overcoming resistance by exciting a reasonable apprehension of danger. If actual force be used, the person whose goods are taken is said legally to be put in fear, actual fear in such case not being essential.[5]

Threats of prosecution do not legally constitute a putting in fear. Some cases have held that to extort money under a threat of charging a person with an unnatural crime is robbery,[6] but this ruling is not in accord with sound principle.[7]

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[1] Code, art. 27, secs. 235–239.

As to the common-law offense, see 1 Bishop Cr. L. § 542; 5 Encyclop. Law, tit. "Disturbing Meetings."

[2] Code, art. 27, secs. 240-244.

Various provisions in relation to "Fish and Fisheries" are also to be found in the Code of "Public General Laws," article 39. In an indictment under such a provision, prohibiting fishing with gill nets in the Potomac, it was held, that the indictment must aver the assent of the State of Virginia to the law, such assent being a condition of its becoming operative. State *v.* Hoofman, 9 Md. 28.

[3] 2 Bishop Cr. L. § 1156.

[4] 1 Hale P. C. 533.

[5] 2 Bishop Cr. L. § 1174; 1 Wharton Cr. L., 8 ed., § 850.

[6] 1 Wharton Cr. L., 8 ed., § 852.

[7] 2 Bishop Cr. L., §§ 1172, 1173.

Every person convicted of the crime of robbery, or as accessory thereto before the fact, shall restore the thing robbed or taken to the owner, or shall pay him the full value thereof, and be sentenced to the Penitentiary for not less than three nor more than ten years.[1]

§ 201.—**Rogues and Vagabonds.**—If any person shall be apprehended having upon him any pick-lock, key, crow, jack, bit or other implement, at places and under circumstances from which an intent may be presumed feloniously to break and enter into any dwelling house, warehouse, storehouse, stable or outhouse, or shall have upon him any pistol, hanger, cutlass, bludgeon or other offensive weapon, also at places and under circumstances from which may be presumed an intent feloniously to assault any person, or shall be found in or upon any dwelling house, warehouse, storehouse, stable or outhouse, or in any enclosed yard or garden or area belonging to any house, with an intent to steal any goods or chattels, every such person shall be deemed a rogue and a vagabond, and, on being convicted thereof, shall be sentenced to the Penitentiary for not less than one month nor more than two years, or to imprisonment in jail, at the discretion of the court, for a like term.[2]

§ 202.—**Sabbath-Breaking.**—Doing work or bodily labor, or commanding or wittingly or willingly suffering one's children or servants to do any manner of work or labor on the Lord's day, commonly called Sunday, works of necessity and charity always excepted, or suffering or permitting any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation, are prohibited, and the offender, upon conviction before a justice of the peace, forfeits five dollars, to be applied to the use of the county.[3] The selling, disposing of, bartering, or, in the case of dealers, giving away on the Sabbath day, commonly called Sunday, of tobacco, cigars, candy, soda or mineral waters, spirituous or fermented liquors, cordials, lager beer, wine, cider or any other goods, wares or merchandise whatsoever are also prohibited, this

[1] Code, art. 27, sec. 245.
[2] Ib., sec. 246.
[3] Ib., sec. 247.

legislation not applying to milk or ice dealers in supplying their customers or to apothecaries when putting up *bona fide* prescriptions.[1] In the City of Baltimore, no vehicle of any description is permitted to carry ice upon the streets or highways, for the purpose of selling the same, on the Sabbath day, commonly called Sunday, and, it is also provided, that, if any person or corporation be found guilty of causing or in any way contributing to the violation of this provision, he shall be subjected to a fine of not more than fifty dollars, in the discretion of the court.[2] The keeping open or using any dancing saloon, opera house, ten-pin alley, barber saloon or ball alley on the Sabbath day, commonly called Sunday, is also made penal.[3] Another provision makes it penal to take or catch oysters on Sunday.[4]

The phrase "gaming on Sunday" has been held to be synonymous with *betting on games*.[5] Work and labor on Sunday is "Sabbath-breaking," but selling liquor or merchandise is not; hence, a prosecution for the latter offense need not be instituted within one month, as provided by article 57, section 11, of the Code of Public General Laws.[6] The prohibition of the sale of liquors on Sunday has no application to the case of social clubs, where liquors are procured, in good faith, for the use of the members and furnished to them, at all times, on Sundays as well as other days, in the customary manner of such clubs.[7] The carrying forward of cattle on Sunday by a common carrier is held to be a work of necessity.[8]

§ 203.—**Sodomy.**—Sodomy is a carnal copulation, by human beings, with each other against nature, or with a beast.[9] The grade of the offense in this State is felony.[10]

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[1] Code, art. 27, sec. 248.
[2] Code, P. L. L., art. 4, secs. 774, 775.
[3] Code, art. 27, sec. 249.
[4] Code, art. 72, sec. 22.
[5] State *v.* Fearson, 2 Md. 310.
[6] State *v.* Popp, 45 Md. 432; Seim *v.* State, 55 Ib. 566.
[7] Seim *v.* State, *supra*. Cf. Chesapeake Club *v.* State, 63 Md. 446.
[8] P. W. & B. R. R. *v.* Lehman, 56 Md. 209.
As to works of necessity in general, see 15 Cent. L. J. 145.
[9] 2 Bishop Cr. L. § 1191.
[10] Davis *v.* State, 3 H. & J. 154.

The punishment is imprisonment in the Penitentiary for not less than one year nor more than ten years.[1]

§ 204.—**Telegraphs.**—Any person who shall unlawfully and intentionally injure, molest or destroy any of the lines, posts, piers or abutments, or the materials or property connected with the working of any telegraph lines, shall, on conviction thereof, be deemed guilty of a misdemeanor and be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county or city jail not exceeding one year, or both, at the discretion of the court before which the conviction shall be had.[2]

Any person connected with any telegraph corporation in this State, either as clerk, operator, messenger, or in any other capacity, who shall wilfully divulge the contents or the nature of the contents of any private communication entrusted to him for transmission or delivery, or who shall wilfully refuse or neglect to transmit or deliver the same, shall, on conviction before any court, be adjudged guilty of a misdemeanor and shall suffer imprisonment in the jail in the county or city where such conviction shall be had for a term of not more than three months, or shall be fined not exceeding five hundred dollars, in the discretion of the court.[3]

§ 205.—**Theatrical Exhibitions.**—It shall not be lawful for any proprietor, lessee or manager of any theater, museum or other place of amusement to employ women or girls as waiters, or to permit them to act in such theater or place of amusement, or among the audience or frequenters of such theater or place of amusement as waiters, or for the purpose or under the pretense of selling, serving, receiving orders or pay for spirituous or malt liquors, wines, lager beer or any other refreshments or merchandise.[4]

Any person violating the provisions of the preceding section shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Criminal Court of Baltimore or the Circuit Court for Baltimore County, shall be sentenced

[1] Code, art. 27, sec. 250.
[2] Ib., sec. 251.
[3] Ib., sec. 252.
[4] Ib., sec. 253.

to pay a fine of not less than one hundred nor more than one thousand dollars, or to imprisonment in jail for not less than one month nor more than six months, or to both fine and imprisonment, at the discretion of the court, and to forfeiture of license, one-half the fine to be paid to the informer and the other half to the State.[1]

§ 206.—**Thieves and Pickpockets.**—A common thief, or pickpocket, is one who is habitually and by practice a thief or pickpocket. The offense is purely statutory and the method of practice and procedure are regulated by the statute,[2] which must be strictly construed.[3] The proof must establish that the accused was a thief or pickpocket within one year from the time of the institution of the prosecution and must be confined to acts of stealing and thieving.[4]

§ 207.—**Toy Pistols.**—It shall be unlawful for any person within this State to manufacture, or to sell, barter or give away the cartridge toy pistol to any one whomsoever. Any person violating this section shall, on conviction thereof, pay a fine of not less than fifty nor more than two hundred dollars, together with the costs of prosecution, and, upon failure to pay said fine and costs, shall be committed to jail and confined therein until such fine and costs are paid, or for the period of sixty days, whichever shall first occur.[5]

§ 208.—**Traction Engines.**—Traction engines, when propelled by steam over any public road, must be accompanied by at least two men, whose duty it is to prevent alarm to horses and assist persons having them in charge and one of whom must precede the engine at least three hundred yards.[6]

§ 209.—**Water Supply—Pollution of Sources Of.**—If any person shall put or cause to be placed any dead animal,

[1] Code, art. 27, sec. 254.

Quaere. Whether this statute must not be construed to apply only to persons having licenses, and whether the indictment must not aver the license? See Bode *v.* State, 7 G. 326.

[2] Code, art. 27, secs. 255–257.

[3] World *v.* State, 50 Md. 49.

[4] Ib.

[5] Code, art. 27, sec. 28.

[6] Ib., secs. 259–263.

or part of the carcass of any dead animal, or any decayed or filthy animal or vegetable matter into any stream, or the tributary of any stream, well, spring, reservoir, pond or other source from which water or ice is drawn, taken or used for drinking or domestic purposes, or shall knowingly suffer any sewage, washings or other offensive matters from any privy, cess-pool, factory, trades' establishment, slaughter-house, tannery or other place over which he shall have control to flow therein or into any drain or pipe communicating therewith, whereby the water supply of any city, town, village, community or household is fouled or rendered unfit for drinking and domestic purposes, he shall be guilty of a misdemeanor, and upon conviction thereof in a court of competent jurisdiction, be fined not more than two hundred dollars for every such offense, and, after reasonable notice, not exceeding fifteen days, from the State Board of Health or any local sanitary authority, to discontinue the act whereby such water supply is fouled, a further sum of not more than fifty dollars for every day during which the offense is continued.[1]

[1] Code, art. 27, sec. 277.

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